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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON COUNTY HOSPITAL ASSOCIATION, INC.,
Petitioner,

v.

BERTHA MORRISON AS ADMINISTRATRIX
OF THE ESTATE OF SYLVESTER MORRISON, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the discharge of a patient from a county hospital by his private physician "state action" on the part of the Hospital?

2. Does a negligence claim against a county hospital arise under the U.S. Constitution or federal law?

3. May a federal court, after summarily dismissing a Plaintiff's claims for lack of a federal question, nevertheless adjudicate those claims?

4. Was the district court's grant of the Hospital's Motion for Summary Judgment proper as it is undisputed that the discharge of Morrison by his private physician was not pursuant to any custom or policy of the Hospital?

LIST OF ALL PARTIES

I. Petitioner:

Washington County Hospital Association, Inc.

II. Respondents:

A. Plaintiff Below:

Bertha Morrison, individually and as administratrix of the Estate of Sylvester Morrison, Jr.

B. Defendants Below:

Dr. Paul Petcher

Washington County Commission, Abb Turner, Leonard Sullivan, Bodie Carpenter, Sherwood Dees, John Armstrong

Sheriff of Washington County, William Wheat

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, —— F.2d —— (1983), is attached as Appendix A.

The Opinion of the U.S. District Court for the Southern District of Alabama, 521 F.Supp. 947 (1981), is attached for information as Appendix B. This Opinion does not directly involve the Petitioner, which has granted summary judgment prior to trial.

JURISDICTION

1. On March 17, 1983, the Court of Appeals for the Eleventh Circuit entered its judgment, attached as Appendix F, reversing the district court in this matter. The Court of Appeals, by Order dated April 25, 1983,

and attached as Appendix G denied the Washington County Hospital Association, Inc.'s Petition for Rehearing and Suggestion for Hearing En Banc.

2. The jurisdiction of this Court to review the Judgment of the Court of Appeals, and its issue the Writ of Certiorari, is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation".

Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted".

Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Statutes:

28 U.S.C. § 1254(1):

"Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree".

28 U.S.C. § 1331:

"The district courts shall have jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States".

28 U.S.C. § 1343:

(a) "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States".

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia".

Alabama Code § 6-5-410:

"(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission or negligence of any person, persons or corporation, his or their servants or agents, whereby the death of his testator in intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death.

(b) Such action shall not abate by the death of the Defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction, or acquittal of the Defendant for the wrongful act, omission or negligence.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of limitations.

(d) Such action must be commenced within two years from and after the death of the testator or intestate."

Alabama Code § 22-21-31:

"Nothing in this article shall be construed as authorizing any person to engage in any manner in the practice of medicine or any other profession nor to authorize any person to engage in the business of child-placing. Any child born in any such institution whose mother is unable to care for such child or any child who, for any reason, will be left destitute of parental support shall be reported to the state department of pensions and security or to any agency authorized or licensed by the state department of pensions and security to engage in child placing for such service as the child and the mother may require. In the rendering of such service, representa-

tives of the state department of pensions and security and agencies authorized or licensed by the state department of pensions and security shall have free access to visit the child and the mother concerned. (Acts 1949, No. 530, p. 835, § 2; Acts 1962, Ex.Sess., No. 122, p. 157, § 2.)"

Washington County Hospital Rule 17:

"Patients shall be discharged only on the written order of the attending physician. At the time of discharge, the attending physician shall see that the record is complete, state his final diagnosis and sign the record."

STATEMENT OF THE CASE

On November 7, 1979, Bertha Morrison, Administratrix of the Estate of Sylvester Morrison (hereinafter "Plaintiff"), filed suit in federal district court against members of the Washington County Commission, the Washington County Hospital Association, Inc. (hereinafter "Hospital"), and the Washington County Sheriff. By Amended Complaint, the Plaintiff added as a Defendant, Sylvester Morrison's (hereinafter "Morrison") attending physician, Dr. Paul Petcher. Plaintiff alleged jurisdiction pursuant to 28 U.S.C. § 1331 and § 1343(3), and sought to invoke the district court's pendent jurisdiction with respect to a state wrongful death claim.[1] (R. 1, 2)

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[1] Alabama Code § 6-5-410 provides: (a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission or negligence of any person, persons or corporation, his or their servants or agents, whereby the death of his testator in intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death; (b) Such action shall not abate by the death of the Defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction, or acquittal of the Defendant for the wrongful act, omission or negli-

Pursuant to 42 U.S.C. § 1983, the Plaintiff alleged that the Defendants deprived Morrison of life without due process of law, and imposed on him cruel and unusual punishment in violation of the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. (R. 1, 2)

Plaintiff alleged that the "Hospital, through its employees, negligently failed to provide adequate diagnosis, supervision, and treatment for Mr. Morrison's condition", and "negligently allowed Mr. Morrison's release or transfer to the Washington County Jail". (R. 3, 4) The Hospital is a thirty (30) bed facility supported by tax revenues. Located in a rural area, the Hospital affords staff privileges to three (3) active physicians, all of whom are in private practice in Washington County. The Hospital employs no doctors.

The deposition of Dr. Paul Petcher, Morrison's private physician of some years, was taken on June 11, 1980. Subsequent to Petcher's deposition, the Hospital moved for summary judgment on the federal and state claims. (R. 154) By Memorandum of Decision dated October 8, 1980, the district court granted the Hospital's motion as to the federal claims, and dismissed the state pendent claims, expressly noting that the Plaintiff had time to file in state court before the two year Statute of Limitations ran. The Court's Memorandum detailed the undisputed facts on the record before it, and is attached as Appendix E. A short summary of the record before the district court is necessary for an understanding of this case.

Dr. Petcher testified that Morrison voluntarily went to the Hospital for treatment on November 7, 1979, and

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gence; (c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of limitations; and (d) Such action must be commenced within two years from and after the death of the testator or intestate."

was admitted on that day by Dr. Patterson, a partner of Dr. Petcher. On November 8, 1979, Dr. Petcher diagnosed his patient as suffering from both diabetes mellitus and delirium tremens (D.T.'s). Morrison attempted to leave the Hospital that morning, but Dr. Petcher was then able to coax him back to his room. By depositions, Hospital staff nurses testified that as the day progressed, Morrison became uncontrollable. He threw a lounge chair across the room and pulled the I.V. out of his arm. He was actually locked in a private room to protect other patients and the Hospital staff.

Dr. Petcher testified that on the morning of November 8, 1979, he had nurses attempt to call members of Morrison's family to the Hospital. Five (5) family members arrived at 6:00 p.m. and left at 7:00 p.m. Dr. Petcher testified that the family refused to stay in the room with Morrison to help settle him, and furthermore, would not agree to take him home for the night.[2] That night, the doctor called a local mental health official in an attempt to have his private patient admitted to the alcohol withdrawal unit at Searcy Mental Institution. Petcher was told by the mental health official that such a transfer was impossible without first having a commitment hearing.

At approximately 8:00 p.m., Dr. Petcher ordered that Morrison be sedated, and that a nurse call the police to come to the Hospital. The nurse's telephonic request that a police officer come to the Hospital was the *sole* act by the Hospital or its staff in any way related to Morrison's ultimate incarceration in the jail. Dr. Petcher told the police officers who came to the Hospital to see that some-

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[2] Dr. Petcher's testimony of what he told Morrison's family was not disputed by the Plaintiff prior to the district court's issuance of the Memorandum of Decision. The content of Dr. Petcher's conversation with the family later became a disputed issue of fact, *although it is not material to the Plaintiff's federal claims against the Hospital.*

one checked on Morrison's condition once every hour and report any changes to him. Approximately eight hours later, under no medical supervision, Morrison died in the Washington County Jail.

Plaintiff responded to the Hospital's motion for summary judgment with the affidavit of Dr. David H. Knott, her expert witness. The affidavit is attached as Appendix H hereto. Dr. Knott said in relevant part:

> Having had the opportunity to review the Hospital records . . . it is inconceivable to me that the decision was made to discharge the patient from a hospital setting to a totally medically unsupervised environment . . . It is not incumbent upon family members to assume any treatment responsibility for a patient who is as psychotic and critically ill as was Mr. Morrison . . . While the decision to transfer Mr. Morrison was obviously that of the attending physician, I find it curious that no other health professional questioned the sagacity of such a move. (Appendix H at 69a-70a)

The Hospital records referred to in Dr. Knott's affidavit said in part:

> At 6:00 p.m., Petcher met with family members at the Hospital. Morrison was restless, talking to himself and possibly hallucinating. At 7:00 p.m., Morrison was in a raging state; he was agitated, restless and threw a chair across the room. Petcher responded at approximately 7:15 p.m. and visited with Morrison until approximately 8:00 p.m. when he directed a member of the nursing staff to call the Sheriff.
>
> At approximately 8:15 p.m., Morrison was discharged from the Hospital by Petcher and was given 100 mg. of vistaril. On discharge, Petcher made the following written orders:
>
> "Patient unruly and family will not stay with him—transferred to jail to be held until commitment tomorrow."

> "Patient stayed at Hospital but was transferred to jail as family would not stay with him and he could not safely be kept without help—to go to Searcy in a.m." (Exhibit 8, Admitted Pre-Trial, R. 213)

The administrator of the Washington County Hospital was Hiller Dickerson. By deposition, Dickerson testified that decisions pertaining to the discharge of patients are medical decisions to be made only by doctors. He testified that pursuant to Hospital Rule 17, no employee (administrator or nurse) had the authority to discharge a patient. Hospital Rule 17 provides:

> Patients shall be discharged only on the written order of the attending physician. At the time of discharge, the attending physician shall see that the record is complete, state his final diagnosis and sign the record. Deposition of Hiller Dickerson at 52. (Exhibit 4, Admitted Pre-Trial, R. 213)

Based on the record before it, the district court held that Dr. Petcher was not acting "pursuant to a custom, policy or practice of the Hospital in discharging Morrison to the police". (Appendix E at 50a). "Therefore, the court holds that . . . no custom, practice or policy operated which resulted in Morrison being sent to the county jail." (Id. at 51a).

Although the district court directed the Plaintiff to take her tort claims to state court where the limitations period had not yet run, the Plaintiff declined to so file. However, by Order of December 12, 1980, the district court reinstated the Plaintiff's tort claims against the Hospital, apparently on grounds of judicial economy. This Order is attached as Appendix D.

On December 19, 1980, the Hospital moved the district court to dismiss the claims against it for lack of jurisdiction. (R. 274) By Order dated February 6, 1981, the district court denied the Hospital's motion, ruling that ". . . this is not a situation where this court would not

otherwise have had subject matter jurisdiction over claims asserted against the . . . [Hospital], and that, ". . . nothing which the Supreme Court said in *Aldinger v. Howard*[3] forecloses this court from adjudicating the wrongful death claim of Bertha Morrison against the Defendants who are not faced with liability under any federal claim". This Order of the district court is attached as Appendix C.

On July 13, 1981, after reviewing the applicable state law, the district court granted summary judgment for the Hospital on the wrongful death claim against it. (R. 484) On appeal to the Court of Appeals for the Eleventh Circuit, a three judge panel reversed both grants of summary judgment in favor of the Hospital. The Court of Appeals apparently ruled in respect to the § 1983 claim that there was state action:

> While the Hospital staff may have performed under the direction of Dr. Petcher, under the circumstances, such is not sufficient to exonerate the Hospital as a matter of law. —— F.2d at ——. (Appendix A at 6a).

The Petitioner herein contests 1) the Court of Appeals' reversal of the district court's summary judgment on the §1983 claim; and 2) the jurisdiction of either the district court or the Court of Appeals over the state claims against the Petitioner.

REASONS FOR GRANTING THE WRIT

I. The Discharge of a Patient From a County Hospital by His Private Physician is Not State Action on the Part of the Hospital

Hospital Rule 17, which required all discharges to be pursuant to written orders of a patient's doctor, was, according to the Plaintiff's own expert physician, good and necessary medical practice. Deposition of Knott, at 50-51. However, this did not prevent the Plaintiff, in her Court

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[3] 427 U.S. 1, 49 L.Ed.2d 276 (1976).

of Appeals Brief, from arguing that "the fact that the Hospital chose to delegate to the medical staff" (of physicians) the decision of discharging patients "will not insulate it from liability".[4]

In *Blum v. Yaretsky*, —— U.S. ——, 73 L.Ed.2d 534 (1982), a case involving the "delegation" to doctors of authority to determine which levels of health care would be given various patients in publicly funded nursing homes, this Court found no state action and said in this regard:

> The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the state is responsible for the specific conduct of which the Plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the state liable for the actions of private parties. —— U.S. at ——, 73 L.Ed.2d at 546.

It was clear on the record before the District Court that Dr. Petcher's decision to send Morrison to the jail was made by the doctor alone. There was no genuine issue of material fact that Dr. Petcher, rightly or wrongly, took the initiative in all decisions of when, if, and how to discharge Morrison. Dr. Petcher had testified in deposition that he sought to avoid sending his patient to the jail by attempting an immediate transfer of him to the alcohol withdrawal unit at a state mental institution. Moreover, in opposing the Motion for Summary Judgment, the Plaintiff's expert by affidavit admitted "the decision to transfer Mr. Morrison was obviously that of the attending physician".

The Plaintiff's theory of state action by the Hospital throughout this litigation has been that staff nurses failed

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[4] Alabama Code § 22-21-31, which governs the licensure of Hospitals, provides in part: "Nothing in this article shall be construed as authorizing any person to engage in any manner in the practice of medicine . . ." The discharge of a patient, as admitted by the Plaintiff's expert, is manifestly a medical decision.

to object either to Dr. Petcher's decision to discharge his patient, or to his decision to have the Sheriff take the patient to the county jail for the night until a commitment hearing could be held the following morning. According to the Plaintiff's Complaint, the nurses' failure was not only a breach of Morrison's federal rights, but also a breach of a tort duty under state law.

If the acquiescence in Dr. Petcher's decision by the nurses was negligent, the Plaintiff could have sued the nurses for negligence, and the hospital for vicarious liability, in state court. But as this Court made clear in *Blum*, supra:

> Mere approval or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the terms of the Fourteenth Amendment. 73 L.Ed.2d at 547.

This is especially true when the Defendant is a hospital, the initiatives are those of a private doctor, and the acquiescence is by staff nurses.

Notwithstanding this Court's opinion in *Blum*, the Court of Appeals said:

> This is not a "malpractice" case as the hospital appellee contends, for it involves the practice and procedures of the hospital's treatment of "unruly" patients and an incident where hospital staff telephoned the Sheriff from the hospital to bodily remove a patient from the hospital resulting in the patient's death in a jail cell . . . It is not merely the fact of discharge but the manner of discharge which is at issue in this case. —— F.2d ——. (Appendix A at 6a).

These factual and legal conclusions of the Court of Appeals, however, evade the record.

The Court of Appeals hypothesized the existence of "the practices and procedures of the hospital's treatment of unruly patients" without delineating what those practices and procedures were. If they existed, what were they? The undisputed record confirmed to the district

court that Dr. Petcher alone made the decisions about what to do with Morrison, and that at least in Dr. Petcher's opinion, the unprecedented discharge by him of one of his longtime patients to the jail was made necessary by the unprecedented refusal of that violent patient's family to stay with him in his hospital room. (Appendix E at 48a). As the district court correctly said, if Dr. Petcher was wrong, this is indeed a malpractice case. (Id. at 48a)

It was not only the acquiescence of the nurses, but also the alleged lack of facilities at the Hospital, that prompted the Court of Appeals to find state action on the part of the Hospital:

> Morrison's discharge was not purely a medical judgment made by a private party according to professional standards. See *Blum v. Yaretsky*, —— U.S. ——, 102 S.Ct. 2777, 2787, 73 L.Ed.2d 534, 549 (1982). Rather, the decision to discharge appears to have been based upon administrative considerations (e.g. lack of facilities, inadequate supervision) for which the hospital cannot disavow responsibility. (Appendix A at 5a-6a).

The Court of Appeals, ostensibly relying on *Blum*, actually embraced the dissent in that case to the effect that since the "state's desire to save money" (an administrative consideration) influenced its delegation to doctors of the authority to determine which facilities (and thus funding) would be given various nursing home patients, state action was present. *Blum*, supra, at 553 (Brennan, J. dissenting).

The fact that a hospital has limited facilities is no more an indication of state action than the fact that a government has a limited treasury. The allegations that the hospital lacked proper facilities or adequate supervisory personnel belong in a negligence suit in state court.

II. A Negligence Claim Does Not Arise Under the U.S. Constitution or Federal Law

The Court of Appeals decreed that the Hospital could not "disavow responsibility" for its alleged "lack of facilities [and] inadequate supervision". The allegation of a lack of facilities and supervision thus predicated the Court's finding not only potential state action, supra, but also a potential violation of a federally secured right. See *Parratt v. Taylor*, 451 U.S. 527, 535, 68 L.Ed.2d 420 (1978) (Both state action and deprivation of a federally secured right jurisdictionally required for a § 1983 claim).

However, the Court of Appeals never said what provision of federal law a lack of facilities and supervision putatively violated:

> We do not here decide that the hospital's conduct caused the deprivation of Morrison's rights, for that is the task for the trier of fact after considering both the general relationship between Dr. Petcher and the hospital and the specific actions of the parties in the rather unique situation of the police removing the patient from the hospital. —— F.2d at ——. (Appendix A at 6a).

But what right did the hospital deny Mr. Morrison? Did Mr. Morrison, who voluntarily went to the hospital, have a federally secured right not to be admitted to the allegedly inadequate facilities there? Should he have been given notice and a hearing on what facilities were available before his admission to the hospital?

Whether the allegedly negligent conduct of any party in this case was a proximate or even superseding cause of Mr. Morrison's death is a question of state tort law. Nevertheless, the Court of Appeals apparently thought that if the Hospital's allegedly inadequate facilities influenced Dr. Petcher's decision to remove the dangerous patient from his room, the Hospital may have been in-

directly chargeable under federal law with his subsequent death. Possible influences on Dr. Petcher's course of action, such as—the pre-commitment hearing requirement,[5] the alleged lack of hospital facilities, the failure of Morrison's family to stay with him in his room, or for instance, the failure of medical science to have already discovered a cure for alcoholism—do not substitute for the legal requirements of bringing a § 1983 action.

In § 1983 actions, ". . . the ultimate determination is simply whether the § 1983 Defendant has brought the force of the State to bear against the § 1983 Plaintiff in a manner the Fourteenth Amendment was designed to prohibit". *Blum*, at 552 (Brennan, J. dissenting). The hospital has searched the constitutional record of the promulgation of the Fourteenth Amendment in vain to find a design by its lawmakers to supplant or supplement negligence lawsuits in state court.

Plaintiff never contended that any agent of the Hospital was responsible for Morrison's confinement in the jail in the sense of false arrest or imprisonment. To the contrary, Plaintiff's sole contention was that the Hospital nurses should have substituted their judgment for Petcher's. Additionally, Plaintiff never contended that at any time material Petcher was anything but a physically and mentally competent physician.

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[5] In Lynch v. Baxley, 386 F.Supp. 378 (M.D. Ala. 1974), Judges Rives and Johnson had ruled that a "due process" hearing must precede all commitments to state mental institutions, thus influencing Dr. Petcher's decision to wait until morning for a commitment hearing before sending his patient to Searcy Mental Institution.

Since the hospital had nothing to do with sending Mr. Morrison to the Washington County Jail for the night, the hospital need take no position on whether an emergency detention of a violent person pending a "due process" commitment hearing is itself a violation of the due process clause of the Fourteenth Amendment.

The Court of Appeals noted the two part inquiry in any claim under § 1983, with the second being ". . . whether this conduct deprived a person of rights . . . secured by the Constitution or laws of the United States." *Parratt v. Taylor*, supra. However, the Court of Appeals Opinion did not answer the question—what right was violated?

Plaintiff alleges that the Hospital was ". . . deliberately indifferent to Morrison's serious medical needs . . ., and that such violated rights under the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution. This phrase is abstracted from *Estell v. Gamble*, 429 U.S. 97, 50 L.Ed.2d 251 (1976), a case that involved the adequacy of medical treatment afforded a prisoner. As stated, Plaintiff's only contention, factually or otherwise, that the Hospital was responsible for Morrison's incarceration was that it did not object to his discharge. This certainly does not raise the spectre of the Eighth Amendment proscription against cruel and unusual punishment and the medical treatment of persons whose liberty and freedom has been restrained or taken. The alleged acts or omissions of the Hospital *all* preceded the confinement for which Plaintiff does not contend the Hospital was responsible.

Assuming agreement that the Hospital's alleged acts or omissions are not to be judged by Eighth Amendment principals, the Hospital must assume the "right" involved was the deprivation of life without due process of law under the Fifth and Fourteenth Amendments:

> ". . . If protected interests are implicated, we then must decide what procedures constitute 'due process of law' . . . the range of interest protected by procedural due process is not infinite . . . We have repeatedly rejected the notion that any grievous loss visited upon a person by the state is sufficient to invoke the procedural protections of the due process clause. Due process is required only when a decision

> of the state implicates an interest within the protection of the Fourteenth Amendment. And to determine whether due process requirements apply in the first place, we must not look to the 'weight' but to the nature of the interest at stake." *Ingraham v. Wright*, 430 U.S. 651, 57 L.Ed.2d 711 (1977) (Citations omitted)

Assuming a protected "interest" the question remains what process is due? In answering this question, the Supreme Court has looked to the availability of adequate state remedies:

> "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . whether in this case the common law remedies . . . constitute due process of law must turn on an analysis of the competing interest at stake, viewed against the background of 'history, reason [and] the past course of decisions'."
>
> "The analysis requires consideration of three distinct factors: First, the private interest that will be affected . . .; second, the risk of an erroneous deprivation of such interest . . . and the probable, value, if any, of additional or substitute procedural safeguards." *Ingraham v. Wright*, 430 U.S. at 675, 51 L.Ed.2d at 732-733.

Applying the above, this Court stated in *Baker v. McCollan*, 443 U.S. 137, 61 L.Ed.2d 443 (1979):

> "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as 'medical malpractice does not become a constitutional violation merely because the victim is a prisoner,' false imprisonment does not become a violation of the Fourteenth Amendment merely because the Defendant is a state official." 443 U.S. at 146, 61 L.Ed.2d at 443.

The Plaintiff in this case had as much right to sue the Hospital for negligence in state court as any other citizen of the State of Alabama. It is the Plaintiff who has misused the federal judiciary in this case to undermine the purpose of the due process clause. The Hospital has the right to prove that its facilities were on par with other small hospitals, that its nurses acted reasonably under the circumstances, and that its conduct in any event was not the legal cause of the death of Morrison. However, by vaguely alleging deprivations of federal rights under § 1983, the Plaintiff has subjected the Hospital to an indecipherable course of judicial proceedings.

In this case, the Plaintiff sued the Hospital for "negligence". She claimed that this negligence was both a breach of state law, and an act under color of state law. To this day, there has yet to be a delineation of what federal right of Morrison the Hospital putatively violated. The reason is that the hospital has violated no federal right.

III. A Federal Court May Not, After Summarily Dismissing a Plaintiff's Claims for Lack of a Federal Question, Nevertheless Adjudicate Those Claims

From the beginning of this case, the Plaintiff's claims against the Hospital have been for negligence. The district court correctly adjudged the absence of a federal question against the Hospital, and properly referred the Plaintiff to state court before the applicable Statute of Limitations had run. The Plaintiff, however, had an aversion to state court, and declined to file there.

The district court based its reinstatement of the negligence claims on a misunderstanding of the "pendent party" doctrine rejected by this Court in *Aldinger v. Howard*, 427 U.S. 1, 49 L.Ed.2d 276 (1976). The district court thought that it had jurisdiction over the subject matter of these claims because "all of the Defendants in this case were initially alleged to have violated the same federal rights". (Appendix C at 33a).

This Court has on many occasions noted the fundamental importance of subject matter jurisdiction, which may be raised at any juncture of litigation. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 83 L.Ed. 1001 (1939). The district court apparently failed to realize that the absence of state action is a jurisdictional defect going to the heart issue of whether a case does in fact arise under the U.S. Constitution or federal law.

This is not a case where the facts necessary to a jurisdictional determination were genuinely in dispute. The district court so ruled when it granted summary judgment to the Hospital for lack of state action. Furthermore, beginning with her Complaint, the Plaintiff herself openly used an allegation of "negligence" to attempt to bootstrap the Hospital into what was supposed to be a civil rights case in federal court. The Hospital was certainly entitled to judgment as a matter of law.

The district court had no authority to reinstate the negligence claims for the sake of "judicial economy and convenience" (Appendix C at 33a), especially since so doing deprived the Hospital of a defense it would have had in state court. Furthermore, since this case did not involve a federal question, the Court of Appeals had no jurisdiction to determine whether the Hospital was entitled to summary judgment as a matter of state tort law.

IV. The District Court's Grant of the Hospital's Motion for Summary Judgment was Proper as it is Undisputed that the Discharge of Morrison by His Private Physician was not Pursuant to any Custom or Policy of the Hospital

Arguendo, even if Plaintiff could allege and prove the deprivation of a federally secured right that claim would be proscribed by *Monell v. Department of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611 (1978) and its holding:

> ". . . a local government may not be sued for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy or custom . . . or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government entity is responsible under § 1983." Id. 694.

Plaintiff, who did not sue the nurses and perhaps recognized the prohibitions of *Monell*, attempted to affix liability on the Hospital by "bootstrapping" her allegations against Dr. Petcher to the Hospital. Plaintiff characterized Petcher's actions as being pursuant to a Hospital "policy or custom". In numerous pleadings, Plaintiff characterized Petcher as an "employee" of the Hospital. However, when it came to the exact policy or custom, he either promulgated or effected, Plaintiff was extremely vague. The Hospital submits such was by design. Plaintiff's only specific reference was to Medical Staff Rule 17.

Petcher and his physician-partners as members of the medical staff, received no remuneration and in fact paid a nominal annual fee for the privilege. Morrison was a long-standing patient of Petcher and his partners and they had treated Morrison for his diabetic condition (and related problems) for years. In the course of these treatments they had on numerous occasions exercised their staff privileges and admitted Morrison to the Hospital. At no time was Morrison treated by a physician in the Hospital's employ as there were none.

Under such facts, Alabama cases hold the same conclusive of an independent contractor relationship and not principal-agent. *Robinson v. Crotwell*, 57 So. 23 (Ala. 1911); *Barfield v. South Highland Infirmary*, 68 So. 30 (Ala. 1915). This fact alone distinguished the cases relied on by Plaintiff where governmental entities were found to have delegated policy-making authority to subordinate employees. Plaintiff's attempt to impose liability on the Hospital through Petcher was nothing more

than a respondent superior theory expressly proscribed by *Monell v. Department of Social Services*, supra.

Plaintiff's "bootstrapping" could be summarized as: Petcher's discharge of Morrison was malpractice and the Hospital is liable by reason of Medical Staff Rule 17. However, Rule 17 provides only that patients be discharged on the written orders of a physician member of the medical staff. As stated, Plaintiff's expert, Knott, opined that a decision to discharge is the practice of medicine and that Rule 17 constitutes good practice, i.e., it insures that only physicians will practice medicine.

There was no casual relation between Rule 17 and Petcher's decision and the district court so held. The district court correctly found that Petcher was not an employee of the Hospital, and that no regulation, policy or custom mandated or even suggested that unruly patients be turned over to the police. To the contrary, Dr. Petcher, in the exercise of professional medical judgment, acted for himself.

CONCLUSION

This case is an appropriate one for review by this Court. The Court of Appeals' imputation of state action to the Hospital was contrary to this Court's decision in *Blum v. Yaretsky*, supra. The Court of Appeals' review of the state tort claims against the Hospital as a pendent party was contrary to this Court's decision in *Aldinger v. Howard*, supra. The Court of Appeals' apparent holding that a claim of negligence will lie under § 1983 was contrary to this Court's decision in *Monell v. Department of Social Services*, supra. This litigant has had to bear tremendous expense coming all the way to this Court to defend a negligence case.

For the foregoing reasons, the Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals should be granted. Alternatively, this Court should direct the

Court of Appeals to Order that all claims against the Hospital be dismissed for lack of a federal question.

Respectfully submitted,

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Counsel for the Washington County Hospital Association, Inc.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 81-7778

BERTHA MORRISON,
Plaintiff-Appellant,

v.

WASHINGTON COUNTY, ALABAMA, *et al.*,
Defendants-Appellees.

March 17, 1983

Appeal from the United States District Court
for the Southern District of Alabama

Before GODBOLD, Chief Judge, FAY and SMITH *, Circuit Judges.

FAY, Circuit Judge:

Bertha Morrison, administratrix of the estate of Sylvester Morrison, appeals the district court's judgments, summary and final, in favor of the defendants, in an action filed pursuant to 42 U.S.C. Section 1983 against the Washington County (Alabama) Hospital Association, Inc., Dr. Paul Petcher, Washington County, five commissioners of Washington County and William Wheat, Sheriff of Washington County. After careful consideration of the district court's judgments, we reverse and remand, 521 F.Supp. 947.

* Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

FACTUAL BACKGROUND

On November 7, 1978, Sylvester Morrison sought treatment for his diabetic condition at Washington County Hospital, in Chatom, Alabama, approximately thirty miles from his home. Morrison had been a patient at this hospital, under the care of Dr. Paul Petcher and other doctors, on numerous occasions during the preceding years, for diabetes and other conditions. During this visit, Morrison was being treated primarily for diabetes, when he was diagnosed as suffering from delirium tremens, a severe form of alcohol withdrawal.[1] His condition worsened and Morrison became irrational, agitated, restless and was hallucinating.

Dr. Petcher determined that Morrison should not remain at the hospital, and directed a hospital staff member to call the sheriff's office. The staff member spoke to Jesse Touchstone, the jailer on duty, and requested that an officer be sent to the hospital. Touchstone radioed a request and Bickerstaff, a Chatom city policeman responded to the call by going to the hospital.

When he realized the call was concerning a hospital patient, Bickerstaff telephoned Sheriff Wheat at home. Wheat told Bickerstaff that it was all right to proceed if Dr. Petcher approved. A sedated Morrison was taken

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[1] While not provided by the parties as evidence for the district court and not relied upon by this court as authoritative, the following definition of delirium tremens is nevertheless informative:

> A psychic disorder involving visual and auditory hallucinations found in habitual and excessive users of alcoholic beverages, usually seen during withdrawal from alcohol . . . .
>
> NURSING PROCEDURE: The patient must never be left alone even momentarily because attempts at suicide are frequent in such cases. The nursing of delirium needs endless patience, tact, and understanding. Restraint should be avoided if possible.
>
> CAUTION: This syndrome is a true medical emergency that should be treated aggressively due to the possibility of death.

Taber's Cyclopedic Medical Dictionary at 379 (Philadelphia: F.A. Davis Company, 14 ed. 1981).

from his hospital room in a wheel chair to the police car. Dr. Petcher stated that he told the officer to check on Morrison every hour, did not direct the officer to charge Morrison with a criminal offense and did not describe Morrison as drunk.

Morrison was taken to the Washington County jail, placed in a one person cell, and charged with public drunkenness. Touchstone, the jailer, testified in a deposition that he had no first aid or medical training, that he was never told anything about giving Morrison any medicine, that he thought Morrison was drunk, and that he wasn't given any instructions to call a doctor or nurse or any other special instructions concerning Morrison. Touchstone also stated that Morrison was hollering and beating his fists and head against the walls. Around four a.m., Touchstone looked in the cell with his flashlight and could not see Morrison moving or breathing. He then telephoned Sheriff Wheat to come to the jail.

The autopsy report prepared by the Alabama Department of Forensic Sciences and submitted to the District Attorney stated that the cause of Morrison's death was "acute alcohol abstinence syndrome." [2]

One year after Sylvester Morrison's death, Bertha Morrison, as administratrix of his estate, filed an action in federal district court against the hospital, Dr. Petcher, the county, the county commissioners and Sheriff Wheat.

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[2] In their brief, appellees Sheriff Wheat, Washington County and the county commissioners contend that the State Forensic Sciences report is not part of the record on appeal. This report was admitted by the district court during the trial as Plaintiff's Exhibit 1 (Tr. at 29). The district court later considered the case as against the Sheriff as "submitted on the record of the case as it has presently progressed." (Tr. at 201). However, when the court inquired of plaintiff's counsel which exhibits he wished considered in the resolution of the claims against Sheriff Wheat, plaintiff's counsel failed to mention Exhibit 1. (Tr. at 202). Nevertheless, the autopsy report, having been duly admitted into evidence, is part of the record on appeal.

The complaint alleged claims pursuant to 42 U.S.C. Sections 1983, 1985(3), 1986 [3] and 1988 as well as a pendent claim for wrongful death under state law.

The procedural history of this case in the district court is confusing at best. The district court entered summary judgments, dismissed claims, vacated summary judgments, granted a directed verdict and entered one judgment on the merits. Because each of the defendants below are in a different procedural posture on this appeal, we shall consider each defendant individually.

THE HOSPITAL

The district court entered summary judgment in favor of the hospital on the civil rights claims (R. at 234) and thereafter entered summary judgment in the hospital's favor on the pendent wrongful death claim under Alabama law (R. at 484). Summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all evidence is viewed in the light most favorable to the non-moving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); Federal Rules of Civil Procedure, Rule 56. The district court's order granting summary judgment is not a discretionary decision and should thus be independently reviewed by the appellate court. *Federal Deposit Insurance Corporation v. Dye*, 642 F.2d 837, 841 (5th Cir. 1981). Conclusions of law rendered by means of summary judgment are subject to the same standard of appellate review as any question of law raised upon appeal. *Id.*

In considering the civil rights claim under 42 U.S.C. Section 1983, the district court correctly noted that there are two elements essential to such a claim: 1) that the

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[3] Morrison has abandoned her claims under 42 U.S.C. Sections 1985 and 1986.

conduct complained of was committed by a person acting under color of state law; and 2) that the conduct deprived a person of rights secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1978). The district court found that although the hospital acts under color of state law, "in this case the hospital took no action." (R. at 246). The district court reasoned that Dr. Petcher was the actor who discharged Morrison and that the hospital did not set a custom, policy or practice which resulted in the deprivation of Morrison's constitutional rights. Therefore, the district court held that under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the hospital could not be liable under the respondeat superior theory and since "nothing which the hospital did" deprived Morrison of any rights (R. at 247), the hospital was not liable.

A hospital is in a unique position. Many of its services are performed by salaried employees. Many others are performed by physicians. These physicians may or may not be independent contractors, residents, interns, etc. A list of essential functions of a hospital would have to include policies and procedures for the admission and discharge of its patients. Hospitals are not hotels. Someone must necessarily make a decision in accord with an established standard or criteria. In this instance the hospital argues that it relied solely upon Dr. Petcher, as an independent treating physician of the deceased, in discharging Morrison.

From the facts before the district court we cannot agree that there is no issue as to any material fact and that the hospital is entitled to judgment as a matter of law. Morrison's discharge was not purely a medical judgment made by a private party according to professional standards. *See Blum v. Yaretsky*, —— U.S. ——, ——, 102 S.Ct. 2777, 2787, 73 L.Ed.2d 534, 549 (1982). Rather, the decision to discharge appears to have been

based on administrative considerations (e.g. lack of facilities, inadequate supervision) for which the hospital cannot disavow responsibility. Based on these considerations, the hospital, acting in concert with Dr. Petcher, arranged for Morrison to be placed in the custody of the county police. Hospital staff telephoned the sheriff's office and participated in the discharge. While the hospital staff may have performed under the direction of Dr. Petcher, under the circumstances, such is not sufficient to exonerate the hospital *as a matter of law.*

We do not here decide that the hospital's conduct caused the deprivation of Morrison's rights, for that is the task for the trier of fact after considering both the general relationship between Dr. Petcher and the hospital and the specific actions of the parties in the rather unique situation of the police removing a patient from the hospital. This is not a "malpractice" case as the hospital appellee contends, for it involves the practice and procedures of the hospital's treatment of "unruly" patients and an incident where hospital staff telephoned the sheriff to bodily remove a patient from the hospital resulting in the patient's death in a jail cell. It is not merely the fact of discharge but the manner of discharge which is at issue in this case. Upon an independent review of the record, we conclude that the hospital was not entitled to judgment as a matter of law on the Section 1983 claim.

After dismissal and reinstatement of the plaintiff's pendent state law claim for wrongful death, and its denial of the hospital's motion for summary judgment [4] the district court again considered the claim on the morning of trial. The court asked plaintiff's attorney if he would waive the notice requirements of Federal Rules of Civil

[4] The district judge had formerly denied the hospital's motion for summary judgment stating, "A genuine issue of fact is raised as to whether the nurses at the Washington County Hospital adequately discharged any duty which they may have owed Sylvester Morrison to make an independent evaluation of the wisdom to discharge Morrison from the hospital to the county jail." (R. at 281).

Procedure, Rule 56, and pointed out that "as the Court saw the case several defendants would be entitled to a directed verdict." (R. at 484). The plaintiff waived the notice requirement and the district court entered summary judgment on the pendent state law claim for wrongful death, Ala.Code Section 6-5-410 (1975), in favor of the hospital. The district court reasoned that plaintiff's allegations concerning the hospital staff's review of Dr. Petcher's decision were insufficient because Alabama does not "impose a duty of care upon a nursing staff to independently review decisions made by the attending physician." (R. at 487). The district court therefore concluded that "without a duty of care which runs from the defendant hospital to the decedent there can be no liability for wrongful death." (R. at 487).

The district court's conclusion that a hospital owes its patients no duty of care is erroneous, as is a conclusion that Washington County Hospital owed no duty of care to Sylvester Morrison. The district court found as a fact that Morrison "presented himself to the Washington County Hospital in Chatom, Alabama" and was admitted to the hospital by Dr. Patterson, an associate of Dr. Petcher's. (R. at 493). Whether the hospital staff should have subsequently questioned, acquiesced or participated in the turning over of a patient to law enforcement authorities is a question of fact. We cannot agree that the hospital merely operates as a slavish handmaiden to the whims of physicians on its staff it claims it has no responsibility for. Under Alabama law, a hospital does have a duty of care to its patients. *See* e.g., *Lloyd Noland Foundation, Inc. v. Harris*, 295 Ala. 63, 322 So.2d 709 (Ala.1975); *Doctors Hospital of Mobile, Inc. v. Kirksey*, 290 Ala. 220, 275 So.2d 651 (1973); *Mobile Infirmary v. Eberlein*, 270 Ala. 360, 119 So.2d 8 (1960). The issue of fact in this case is whether it breached that duty. The district court's entry of summary judgment on the pendent wrongful death claim will accordingly be reversed.

THE DOCTOR

The district court granted summary judgment in favor of Doctor Petcher on the Section 1983 claim based on the conclusion that "no state action was involved in the decision by Dr. Petcher to discharge Morrison to the police. The conduct of Dr. Petcher was wholly private." (R. at 249). Dr. Petcher was on the staff of Washington County Hospital, treating a patient in the hospital, directing hospital staff and utilizing hospital facilities. While the *decision* concerning Morrison's discharge involved Dr. Petcher's mental processes, the circumstances and fact of the discharge are at issue. Under *Parratt v. Taylor, supra*, the inquiry is not the doctor's abstract status, but whether the discharge was committed by "a person acting under color of state law," i.e., whether Dr. Petcher was acting under color of state law when he arranged for the law enforcement authorities to remove Morrison from the hospital.

In *Lugar v. Edmondson Oil Co.*, —— U.S. ——, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), the Supreme Court set out a two part test for determining if the deprivation of a federal right is fairly attributable to the state.

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible.

Id., —— U.S. at ——, 102 S.Ct. at 2754, 73 L.Ed.2d at 495. In the case at bar the alleged deprivation was caused in part by persons for whom the state is clearly responsible—the hospital staff and county police.

> Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

Id. Dr. Petcher was faced with the problem of what to do with Morrison. In solving this problem he enlisted the aid of the hospital staff and the county police and arranged for Morrison's confinement. In his treatment of Morrison, Dr. Petcher "acted together with" and "obtained significant aid from state officials." Under these circumstances the district court erred in finding as a matter of law that Dr. Petcher was not a state actor.

An independent review of the record in accordance with *Federal Deposit Insurance Corporation v. Dye, supra,* leads us to conclude that the doctor has failed to sustain his burden of showing the absence of genuine issues as to any material fact. Again, we do not intimate whether or not Doctor Petcher's conduct subjected him to liability under Section 1983, but only that summary judgment was erroneously granted on the state of the record before the district court.

The pendent state law claim against Dr. Petcher for wrongful death was dismissed and reinstated. Dr. Petcher then filed a renewed motion for summary judgment, which the district court denied on the basis that a genuine issue of material fact remained as to whether Dr. Petcher failed to discharge the duty of care which he owed to Morrison. The case proceeded to trial on the state wrongful death claim against Dr. Petcher and the district court directed a verdict in favor of the doctor. As explained by the district court in its Order:

> By the second day of the trial, July 14, 1981, the plaintiff had called her expert witness to testify to the quality of the treatment received by the decedent from Dr. Paul Petcher. The Court ruled that the expert, Dr. David H. Knott, lacked sufficient basis upon which to express an expert opinion. Dr. Knott testified that he was unfamiliar with the quality of care rendered by a general family practitioner in the same general neighborhood in and around Chatom, Alabama. Under Alabama law this ren-

> dered Dr. Knott's testimony inadmissible. Without expert testimony from a physician the plaintiff would, as a matter of law, be unable to prove any negligence against Dr. Petcher.

(R. at 492).

Appellant Morrison contends that the district court erred in excluding the testimony of her expert, Dr. David Knott, which if true undermines the rationale for the directed verdict.

The district court excluded Dr. Knott's testimony because Dr. Knott was not familiar with the practice of medicine in Alabama in 1978 and was therefore not qualified to testify under *Zills v. Brown*, 382 So.2d 528 (Ala.1980). In *Zills*, the Alabama Supreme Court considered the various rules for the admission of testimony of medical experts and concluded that the "same general neighborhood" rule rather than the "strict locality" rule applied in Alabama. The Alabama court noted that there had not been a proper challenge to the "same general neighborhood" rule at trial and thus such a rule could not be abolished on that appeal. However, the Alabama court opined:

> [W]e are inclined to view that Alabama's "same general neighborhood" rule does in fact encompass a national standard of care for reasonably skilled physicians acting in the same or similar circumstances, unless there is evidence that demonstrates such a national medical neighborhood standard could not, because of justifiable circumstances, be adhered to. We deem the language "same general neighborhood" to refer to the national *medical neighborhood* or *national medical community*, of reasonably competent physicians acting in the same or similar circumstances. We are of the opinion that Alabama's neighborhood rule, which was recently codified in Section 6-5-484(a), Code 1975, is an enlightened one

> which takes into account the realities extant in the present day national *medical world, community*, or *neighborhood*; no matter which term one chooses. The rule logically recognizes that today there is no lack of opportunity for a physician or surgeon to keep abreast of the advances made in his profession and to be familiar with the latest methods, procedures, and practices adopted.

382 So.2d at 532. (emphasis in original).

Attempting to apply *Zills*, the district court held that evidence of a national standard was not sufficient under Alabama law because "*Zills* was maybe what the law will be someday in Alabama. Judge Bloodworth is no longer on the Supreme Court, one of the plurality. I don't know how it will come out, and I am not going to apply it to this standard in this case." (Tr. at 187). The district court's question about the viability of the *Zills* dicta was subsequently resolved by the Alabama Supreme Court in *Drs. Lane, Bryant, Eubanks & Dulaney v. Otts*, 412 So.2d 254 (Ala.1982) where Alabama's highest court agreed with its prior description of the same general neighborhood as the "*national medical neighborhood* or *national medical community*, of reasonably competent physicians acting in the same or similar circumstances." *Id.* at 258, *quoting Zills, supra* at 532.

The district court's exclusion of Dr. Knott's testimony was erroneous under Alabama law and thus the verdict directed in favor of the doctor on the basis of lack of expert testimony is reversed.

THE COUNTY AND COMMISSIONERS

The district court granted summary judgment in favor of the Washington County Commissioners on the federal law claims because the "commissioners were not the actors who discharged Morrison to the police." (R. at 248). Shortly thereafter, the court also entered summary

judgment on the federal claims in favor of Washington County, a non-moving party. (R. at 262). During the morning of trial conference, the court entered summary judgment in favor of the commissioners and the county on the wrongful death claim. (R. at 485).

Again, an independent review of the record, *Federal Deposit Insurance v. Dye*, *supra*, leads us to a conclusion that the county and commissioners have failed to sustain the burden of showing the absence of genuine issues as to material facts. The trial court focused on the discharge of Morrison from the hospital. Morrison argues that the liability of the county and commissioners arises from systemic failures in the jail where Morrison died. Material issues of fact remain concerning the operation of the jail and the medical treatment for inmates, making judgment as a matter of law on the Section 1983 claim and wrongful death claim inappropriate. There was affirmative testimony showing a total lack of any training of those in charge of the jail as to the handling of medical problems that might arise. The law has long since passed the point where prisoners are incarcerated and then totally ignored. Again, we do not intimate that the county or its commissioners are legally liable, but only that judgment as a matter of law on the state of the record before the district court was improper.

THE SHERIFF

The district court entered findings of fact and conclusions of law dismissing the claims of Morrison against Sheriff Wheat under Section 1983 and the Alabama wrongful death statute. As explained by the district court:

> After [the] ruling that Dr. Knott would be unable to express an opinion the plaintiff huddled with her attorneys and proposed for tactical reasons, several alternatives to the Court. . . . [T]he plaintiff agreed to submit the case against Sheriff Wheat to

> the Court for decision by the Court as though the case had been tried to the bench from the start rather than to a jury.

[R. at 493-493]. The district court then entered lengthy findings of fact, including:

> The Court finds that the cause of death was acute cardiac arrest. That an acute cardiac arrest is completely unpredictable and untreatable within three minutes after it has occurred. That the cause of death i.e. acute cardiac arrest, did not have any relationship to the alcohol withdrawal or delirium tremens of Sylvester Morrison. Dr. Petcher could not and did not anticipate the occurrence of acute cardiac arrest.
>
> The Court finds that there was no way Jailer Touchstone could have known of or anticipated the occurrence of the acute cardiac arrest, it could have happened anywhere at any time. The Court finds that nothing was done that should not have been done or not done that should have been done by either the defendant Sheriff William Wheat or Jailer Touchstone that in any way caused or contributed to the acute cardiac arrest which resulted in the death of Sylvester Morrison.

[R. at 498-99].

The district court entered its finding that there was no causal connection between the delirium tremens and the cardiac arrest without the benefit of the testimony of plaintiff's expert, Dr. Knott. As discussed above, such testimony was erroneously excluded under Alabama law. *Drs. Lane, Bryant, Eubanks & Dulaney v. Otts*, 412 So.2d 254 (Ala.1982). There is a serious issue in this case concerning the relationship between the delirium tremens and the cardiac arrest and what, if anything, anyone could have done to prevent Morrison's death. Exclusion of Dr. Knott's testimony was not harmless error and re-

quires reversal of the judgment in favor of the sheriff in order that the finder of fact may consider plaintiff's expert's testimony.

In considering the section 1983 claim against Sheriff Wheat, the district court concluded that "Sheriff Wheat was entitled to authorize the incarceration of Morrison, as he surely did when he told Officer Bickerstaff [a city policeman] 'to go ahead' and incarcerate Morrison." [R. at 50]. The district court noted that Alabama authorizes the arrest of a person if that person commits a public offense in the presence of the arresting officer. Officer Bickerstaff arrested Morrison and charged him with the offense of "public drunkenness." From the record, it appears that Morrison was neither in public, but in a hospital as a patient, nor drunk, but suffering from lack of alcohol. The record indicates a constant flow of information between Officer Bickerstaff, a city policeman, and Sheriff Wheat. In addition to the reasons set forth above relating to the exclusion of Dr. Knott's testimony, we remand this case to the district court for consideration of Sheriff Wheat's knowledge of the circumstances of the arrest and subsequent decision to incarcerate. Serious factual issues remain concerning the removal of a seriously ill patient from a hospital and his confinement in a jail with no medical facilities under the observations of untrained personnel.

CONCLUSION

This case presents difficult and serious issues. The district court conscientiously struggled to discern various claims against multiple defendants, each attempting to abdicate responsibility for the series of tragic events culminating in the death of Sylvester Morrison. While the trier of fact may ultimately find that none of the defendants is legally liable for Mr. Morrison's death, the trier of fact should be afforded that opportunity. Accordingly, this case is REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
S. D. ALABAMA, S. D.

Civ. A. No. 79-0632-H

BERTHA MORRISON, ETC.,
Plaintiff,

v.

WASHINGTON COUNTY, ALABAMA, *et al.*,
Defendants.

Sept. 3, 1981

Larry T. Menefee & J. U. Blacksher, Mobile, Ala. and Jack Drake, University, Ala., for plaintiff.

Walter M. Cook and Mack B. Binion, Mobile, Ala., for Washington County Hospital Ass'n, Inc.

Peter V. Sintz and Robert C. Campbell, III, Mobile, Ala., for Washington County, Turner, Sullivan, Carpenter, Deas, Armstrong and Wheat.

James J. Duffy, Jr. and Carroll H. Sullivan, Mobile, Ala., for Dr. Paul Petcher.

ORDER

HAND, Chief Judge.

On July 13, 1981 the trial of this case to a jury commenced. Only two defendants remained in the case. The two were Dr. Paul Petcher and Sheriff William Wheat. The claim against Dr. Petcher was a state-law claim for wrongful death. The claims against Sheriff William Wheat arose under 42 U.S.C. § 1983 and Alabama's Wrongful Death statute.

By the second day of the trial, July 14, 1981, the plaintiff had called her expert witness to testify to the

quality of the treatment received by the decedent from Dr. Paul Petcher. The Court ruled that the expert, Dr. David H. Knott, lacked sufficient basis upon which to express an expert opinion. Dr. Knott testified that he was unfamiliar with the quality of care rendered by a general family practitioner in the same general neighborhood in and around Chatom, Alabama. Under Alabama law this rendered Dr. Knott's testimony inadmissible. Without expert testimony from a physician the plaintiff would, as a matter of law, be unable to prove any negligence against Dr. Petcher.

After ruling that Dr. Knott would be unable to express an opinion the plaintiff huddled with her attorneys and proposed, for tactical reasons, several alternatives to the Court. First, the plaintiff proposed to rest her case against Dr. Petcher. Second, the plaintiff agreed to submit the case against Sheriff Wheat to the Court for decision by the Court as though the case had been tried to the bench from the start rather than to a jury.

Both proposals were agreeable to the Court. In light of the decision by the plaintiff to rest as to Dr. Petcher the Court directed a verdict in favor of Dr. Petcher. The findings of fact and conclusions of law which the Court enters today address only the claims against Sheriff Wheat under 42 U.S.C. § 1983 and Alabama's Wrongful Death statute.

I. Findings of Fact

After the parties appeared in open court, after hearing the testimony of Mr. Hiller Dickerson, Dr. Paul Petcher, Dr. William Knott, and after reviewing the depositions of the defendant Sheriff William Wheat, Dr. Terrance Collins and Jesse Touchstone, the Court finds the facts to be as follows:

The decedent, Sylvester Morrison, Jr., was a thirty-nine-year-old black male who resided in Citronelle, Alabama.

Sylvester Morrison, Jr. presented himself to the Washington County Hospital in Chatom, Alabama on November 7, 1978 at approximately 1:00 p.m. at which time he was admitted to the hospital by Dr. H. C. Patterson of the Chatom Clinic.

The defendant, Sheriff William Wheat, was at all times material to this action, the Sheriff of Washington County, Alabama and the Washington County Commission provides some public funds for the operation of the Sheriff's Department on an annual basis.

Dr. Paul Petcher and Dr. Patterson were at all times material to this action admitted to the medical staff of the Washington County Hospital, (hereinafter called Hospital) and Dr. Patterson was the admitting physician for Sylvester Morrison, Jr. on November 7, 1978.

Ricky Bickerstaff was at all times material to this action employed by the City of Chatom, Alabama as a City Police Officer and that Mike Barnett was at all times material to this action employed by the State of Alabama as an Alabama State Trooper.

Sylvester Morrison, Jr. had been a longstanding patient of several years at the Chatom Clinic, which is composed of Dr. Paul Petcher, Dr. H. C. Patterson and Dr. J. L. Hubbard, Jr., Throughout the course of Sylvester Morrison's treatment by the Chatom Clinic, there had been a suggestion of alcoholism.

In the early afternoon of November 7, 1978, Sylvester Morrison was admitted to the Hospital by Dr. H. C. Patterson with a diagnosis of acute gastro enteritis and diabetes mellitus.

By the morning of November 8, 1978, Morrison began to manifest symptoms of alcohol withdrawal. He was treated by Dr. Paul Petcher with appropriate medications for alcohol withdrawal.

Dr. Petcher instructed the staff at the Hospital to call the family of Morrison at approximately 8:00 a.m. and again at 3:00 p.m. on November 8, 1978 for the purpose of obtaining assistance in treating him.

Dr. Petcher found Mr. Morrison in the lobby of the hospital at about 8:00 a.m. on November 8, 1978 trying to leave the hospital. After talking with Morrison, Dr. Petcher was able to get him to return to his room.

During the day of November 8, 1978, Morrison became increasingly restless, agitated and confused on an intermittent basis. It became necessary during the day to move Sylvester Morrison into a hospital room in which the door could be locked. On one occasion while in the locked room, Morrison threw a chair in the direction of nurses who were standing behind the locked door.

By 6:00 p.m. on the evening of November 8, 1978, various family members of Morrison had arrived at the Hospital and met with Dr. Petcher. Dr. Petcher sought to enlist their aid by getting one family member to sit in the hospital room with Morrison throughout the remainder of the evening. Dr. Petcher explained to the family that in his judgment this was necessary in order to control Morrison until a commitment hearing could be had the following morning to admit him to Searcy Hospital, a State institution in Mt. Vernon, Alabama, with an alcohol detoxification unit. The family members present refused to stay with Morrison.

As a second alternative, Dr. Petcher asked the family members to take Morrison home with them where they could take care of him and return him to Chatom the following morning for a commitment hearing. The family members again refused.

It is not altogether clear who suggested using the Washington County Jail as the facility in which to house Sylvester Morrison overnight until the commitment hearing the following morning. One member of the family

did request that the Citronelle City Jail be used as opposed to the Washington County Jail since Morrison was known to the people of the City of Citronelle. This was not a satisfactory alternative to Dr. Petcher as the Citronelle Jail was too far away from him and his office in the event he were needed to render further medical treatment to Morrison.

Dr. Petcher contemplated having a commitment hearing to get Morrison admitted to Searcy Hospital, at the earliest possible time on November 9, 1978. Dr. Petcher determined during the evening of November 8, 1978 that he could not get Sylvester Morrison admitted to Searcy Hospital that evening and that a commitment hearing was a necessary prerequisite.

Dr. Petcher was seeking satisfactory alternatives and a place to house Sylvester Morrison until the commitment hearing could be held early on the morning of November 9, 1978. Dr. Petcher determined that without family assistance, he could not safely house Morrison at the Hospital until the commitment hearing could be held.

Dr. Petcher also concluded and determined that it was not practical to put Morrison into the University of South Alabama Medical Center or the Providence Hospital in Mobile, Alabama on the evening of November 8, 1978.

By this time, 6:00 p.m. on November 8, 1978, Morrison was suffering from delirium tremens and that his other medical problems such as his diabetes were under satisfactory control and management at that time. Dr. Petcher then made the decision to discharge Morrison from the Hospital.

After this decision was made, Dr. Petcher prescribed 100 m.g. of Visaril, which is double the usual dosage given, and instructed the Hospital staff to call the Washington County Jail. It was Dr. Petcher's expectation that this medication in conjunction with the medications Mor-

rison had been receiving during the day of November 8, 1978 would last Morrison 10 to 12 hours. The last injection of the 100 m.g. of Visaril was given at 8:00 p.m. on November 8, 1978. He did not think Morrison would need any further medication or treatment before the next morning.

Someone from the Hospital called the Washington County Jail and spoke with the jailer, Jesse Touchstone, (hereinafter called Touchstone) and requested that an officer be sent to the Hospital. The Hospital is located within the city limits and police jurisdiction of the Town of Chatom, Alabama.

Touchstone radioed Ricky Bickerstaff, (hereinafter called Bickerstaff), a City of Chatom Police Officer to respond to the call because the Hospital is in the city police jurisdiction.

The caller did not inform Touchstone that a hospital patient was to be picked up or that there was to be a commitment hearing the following morning of November 9, 1978.

The City of Chatom Police Officer, Bickerstaff, arrived at the Hospital with an Alabama State Trooper, Mike Barnett. Dr. Petcher met Officer Bickerstaff and instructed him to take Sylvester Morrison to the Washington County Jail with the directions that Morrison should be looked in on at least every hour. The information and direction was never imparted to Jailer Touchstone or to Sheriff William Wheat.

While at the Hospital, Officer Bickerstaff called Sheriff William Wheat at his home. During this conversation, he did not inform Sheriff Wheat that Morrison was a patient at the hospital. He informed Sheriff Wheat that there was a drunk at the hospital that Dr. Petcher wanted to keep in jail until a commitment hearing could be held the next morning. The Sheriff replied that it was all right with him if it was all right with Dr. Petcher.

Sheriff Wheat was not informed of the identity of Morrison nor that he was a patient at the Hospital in the throes of delirium tremums. In addition, Sheriff Wheat did not go to the Washington County Jail that night.

During his conversation with Sheriff Wheat, Officer Bickerstaff did not express any reservations about placing Morrison in jail. Based on the conversation with Officer Bickerstaff, Sheriff Wheat assumed that Sylvester Morrison had just shown up at the Hospital since he was drunk at that time.

There is only one jail or detention facility in Washington County, Alabama. The City of Chatom, under an arrangement with the county, also uses it to house their prisoners. Pursuant to this agreement, Officer Bickerstaff transported Morrison to the Washington County Jail.

When they arrived at the Washington County Jail, Officer Bickerstaff charged Morrison with public drunkenness. The Court finds that Mr. Morrison was then a prisoner of the City of Chatom.

The defendant Sheriff William Wheat will not allow anyone to be held in his jail without either a charge or a court order authorizing the detention.

Jailer Touchstone had never seen or heard of Sylvester Morrison until he arrived at the jail. Mr. Morrison appeared to Touchstone to be drunk and he looked and acted like a drunk to Touchstone. Touchstone then placed Morrison in a one-man cell.

Touchstone does not have anything to do with the docketing or charging of prisoners with either city or state offenses. The arresting officer makes the appropriate charge.

No instructions, medications or directions concerning Morrison were given to Touchstone or to Sheriff William Wheat by anyone. While in the one-man cell, Morrison became loud and disruptive several times during the

course of the evening. Jailer Touchstone went to the cell and talked with Morrison during the course of the evening in an attempt to calm and quiet him. The last time he spoke with Morrison was approximately 4:00 a.m. on November 9, 1978.

After talking with Morrison, Morrison quieted down and sat down on the edge of the shower. At that time he appeared to be quiet and remained quiet the rest of the night.

Morrison was subsequently found dead in the shower at approximately 5:30 to 5:45 a.m. by Touchstone.

The Court finds that the cause of death was acute cardiac arrest. That an acute cardiac arrest is completely unpredictable and untreatable within three minutes after it has occurred. That the cause of death i.e. acute cardiac arrest, did not have any relationship to the alcohol withdrawal or delirium tremens of Sylvester Morrison. Dr. Petcher could not and did not anticipate the occurrence of an acute cardiac arrest.

The Court finds that there was no way Jailer Touchstone could have known of or anticipated the occurrence of the acute cardiac arrest, it could have happened anywhere at any time. The Court finds that nothing was done that should not have been done or not done that should have been done by either the defendant Sheriff William Wheat or Jailer Touchstone that in any way caused or contributed to the acute cardiac arrest which resulted in the death of Sylvester Morrison.

II. Conclusions of Law

This Court has jurisdiction over this controversy under both its original jurisdiction, 28 U.S.C. §§ 1331, 1343, and its pendent jurisdiction.

The plaintiff alleges several violations of the constitutional rights of Sylvester Morrison during his incarcera-

tion in the Washington County Jail pending a commitment hearing to Searcy Hospital. The crux of the plaintiff's complaint is that Morrison's constitutional freedoms under the fourth and fourteenth amendments were abridged and that Sheriff William Wheat if responsible under state law for the wrongful death of Morrison.

A. The Fourth Amendment

At the time the police took custody of Morrison at the Hospital he was under arrest. An arrest was effectuated because he was not free to go as he pleased. The police were free to arrest Morrison in one of two situations: 1) upon the issuance of an arrest warrant or 2) if a warrantless arrest was authorized under Ala. Code § 15-10-3 (1975).[1]

Initially it should be noted that the plaintiff never proved whether Morrison was taken into custody under the authority of an arrest warrant. One might assume that the record is clear on this point, but that assumption is unfounded. After examining the record in this case

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[1] Alabama law allows a warrantless arrest by a duly authorized police officer under the following circumstances:

> § 15-30-3. Arrest without warrant—When and for what allowed.
>
> An officer may arrest any person without a warrant, on any day and at any time, for:
>
> (1) Any public offense committed or a breach of the peace threatened in his presence;
>
> (2) When a felony has been committed, though not in his presence, by the person arrested;
>
> (3) When a felony has been committed and he has reasonable cause to believe that the person arrested committed it;
>
> (4) When he has reasonable cause to believe that the person arrested has committed a felony, although it may afterwards appear that a felony had not in fact been committed; or
>
> (5) On a charge made, upon reasonable cause, that the person arrested has committed a felony.

Ala. Code § 15-10-3 (1975).

the Court is left to speculate whether, in fact, Morrison was taken into custody pursuant to a regularly-issued arrest warrant. Nothing appears in the record on this point either one way or the other. The burden of proof on this point is upon the plaintiff, since it is she who seeks to prove that Morrison was denied his fourth amendment right under the Constitution. Before the Court can determine whether a regularly-issued arrest warrant was used to arrest Morrison the plaintiff would have had to have offered evidence showing the absence of an arrest warrant. A court may not speculate any more than may a jury in reaching a verdict. For this reason alone the plaintiff's claim under the fourth amendment must fail.

But even assuming that the record adequately established the absence of a regularly-issued arrest warrant, under the facts of this case Sheriff Wheat was entitled to authorize the incarceration of Morrison, as he surely did when he told Officer Bickerstaff "to go ahead" and incarcerate Morrison in the Washington County Jail. Wheat Deposition at 10. Bickerstaff told Wheat that Morrison was intoxicated in public. Bickerstaff charged Morrison with public drunkenness when he reached the county jail. *Id.* at 15; Plaintiff's Exhibit 5. Section 15-10-3 authorizes the arrest of a person without an arrest warrant if that person commits a public offense in the presence of the arresting officer. Bickerstaff arrested Morrison, and given that arrest, the Sheriff was justified in authorizing Morrison's incarceration. *Cf. Cade v. State*, 375 So.2d 802, 826 (Ala.Cr.App. 1978), *aff'd without opinion*, 375 So.2d 828 (Ala. 1979). The Court holds that no violation of the fourth amendment occurred.

B. The Fourteenth Amendment

The due process clause of the fourteenth amendment and not the cruel and unusual punishment clause of the eighth amendment sets the standard by which this Court

must judge the medical care which Morrison received while he was incarcerated in the Washington County Jail.[2]

> Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be "cruel and unusual" under the Eighth Amendment. The Court recognized this distinction in *Ingraham v. Wright*, 430 U.S. 651, 671-672, n.40, 97 S.Ct. 1401 [1412-1413, n.40], 51 L.Ed.2d 711, 97 S.Ct. 1401 (1977):
>
> "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. *See United States v. Lovett*, 328 U.S. 303, 317-318 [66 S.Ct. 1073, 1079-1080, 90 L.Ed. 1252] (1946) . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment."

Bell v. Wolfish, 441 U.S. 520, 535 n.16, 99 S.Ct. 1861, 1872 n.16, 60 L.Ed.2d 447 (1979). "The standard by which to measure the medical attention that must be afforded pretrial detainees has never been spelled out. The *Bell v. Wolfish* criterion, applied to medical attention, entitled pretrial detainees to reasonable medical care unless the failure to supply it is reasonably related to a legitimate government objective." *Jones v. Diamond*, 636 F.2d 1364, 1378 (5th Cir. 1981) (en banc).

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[2] Originally when the Court addressed this issue in its order dated October 7, 1980 the Court missed the distinction between pretrial detainees and convicted prisoners.

In this case the medical care which Morrison received was reasonable. Morrison's attending physician, Dr. Paul Petcher, discharged Morrison from the Hospital at approximately 8:00 p.m. on November 8, 1978. At the time of the discharge Morrison was heavily sedated with Visaril. Dr. Petcher testified that ordinarily no further medication or treatment would be necessary prior to the morning of November 9, 1978, when Morrison was scheduled to appear in state court for commitment proceedings to the state mental health hospital. Thus, it was the expert opinion of Dr. Petcher that Morrison had the medical care which he should receive during the evening of November 8th through the early morning of November 9th. Nothing changes this fact, regardless of what Jailer Touchstone did or failed to do and regardless of what Touchstone knew or did not know about Morrison's prior treatment and present medical condition. Morrison received reasonable medical care; there was no failure on the part of Sheriff Wheat to provide reasonable medical care.

The absence of a highly trained medical technican or a physician at the Washington County Jail does not render the medical care per se unreasonable. A small, rural jail, with no prior history of medical emergencies, is not constitutionally required to maintain a medical technician or a physician on the premises. In fact, Dr. Petcher testified that he was on-call at the county jail and available to treat any medical emergencies. This was the standard operating procedure.

As in all aspects of life the United States Constitution sets the minimal standards which government owes its citizens when it protrudes into constitutionally protected areas. The due process clause requires that pretrial detainees receive reasonable medical care. Undoubtedly, Morrison might have received better medical care than that which he received. However, this case does not turn upon whether Morrison might have received better medical care or whether he received the best medical care. The

care which he received was reasonable. The Constitution requires nothing more of Sheriff Wheat. Therefore, the Court holds that the plaintiff has failed to prove any violation of Morrison's fourteenth amendment rights.

C. Immunity

Had liability under § 1983 been established for a violation of Morrison's fourth amendment or fourteenth amendment rights the Sheriff would be protected from liability in his individual capacity because of his qualified, good-faith immunity. *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975); *Familias Unidas v. Briscoe*, 619 F.2d 391, 403 (5th Cir. 1980). As to the fourth amendment claim the Sheriff recognized that a person could only be confined in the Washington County Jail if he had either 1) been charged with an offense or 2) been arrested pursuant to the terms of regularly issued judicial process. Wheat Deposition at 15-16. Thus the authorization which the Sheriff extended to Bickerstaff to incarcerate Morrison was made with a careful eye toward constitutional limitations.

Under the fourteenth amendment claim, if one had been made out, the Sheriff would be shielded from liability in his individual capacity. At the time Morrison tragically died in the Washington County Jail the Supreme Court had yet to decide *Bell v. Wolfish*. That case was decided May 14, 1979; Morrison died November 9, 1978. It goes without saying that a sheriff from a rural community is not charged with forecasting the development of constitutional doctrine.

Had the Sheriff been judged by the deliberate indifference standard of *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976), which would have appeared to be the prevailing standard in November, 1978, no liability would attach to Sheriff Wheat. The record is clear that Wheat knew nothing about the details of the medical treatment which Morrison received while

in the jail. Without some personal knowledge of the medical care which Morrison received, the Sheriff could not have acted with the intent required by *Estelle v. Gamble*, i.e. deliberate indifference to the serious medical needs of Morrison.

Moreover, nothing in this case suggests that Wheat set out with the malicious intention to deprive Morrison of his constitutional rights. Had liability under § 1983 been established, Wheat would enjoy immunity for damages in his individual capacity.

D. Wrongful Death

In addition to the claims under § 1983 the plaintiff seeks recovery of punitive damages under Alabama's Wrongful Death Statute. Ala.Code § 6-5-410 (1975). Section 6-5-410 provides a cause of action to the personal representative of the decedent against any person or corporation where the wrongful act, omission, or negligence of the person or corporation caused the death of the decedent. A person or corporation can also be bound by an agent.

Undoubtedly the Sheriff, or his jailer acting within the scope of his employment, had a duty to exercise reasonable care to see to it that pretrial detainees and prisoners alike were afforded reasonable medical care. Reasonable medical care is that degree of care which a reasonable person under like circumstances as Sheriff Wheat would have made available. In this case, Morrison was discharged directly from the Hospital to the jail. Dr. Petcher testified that Morrison was adequately sedated and that, in his opinion, no additional treatment or medication would be required by Morrison at least through the night. While neither Sheriff Wheat or Jailer Touchstone were aware of this, the fact remains that a doctor had been supervising Morrison up to the time he was discharged to the jail and it was *the opinion of the doctor* that Morrison would need no additional medication or

treatment. The duty to exercise reasonable care which the Sheriff owed a pretrial detainee such as Morrison was satisfied. The Sheriff could have done no more had it been his policy to have each prisoner examined by a physician upon being admitted to the jail. Morrison was examined and treated by a physician shortly before being placed in the one-man cell at the Washington County Jail. For purposes of this analysis it is quite irrelevant that the examination took place a few miles from the jail and a few minutes before Morrison actually crossed the threshold of the jailhouse door. The Court holds that the duty of care which Sheriff Wheat owed to provide adequate medical supervision at the jail was not breached.

Likewise, it cannot be said that the duty which the Sheriff owed to properly supervise pretrial detainees in a reasonable manner was breached. The testimony is that Jailer Touchstone repeatedly checked on Morrison as the evening progressed. Morrison was locked in a one-man cell, protected from others. While it may be said that Morrison's conduct had the potential to physically injure him, the record does not support such a finding. Morrison was no more unruly than many people who were incarcerated in the Washington County Jail. A sheriff is charged under the law with the duty to reasonably supervise his prisoners and not with the duty to absolutely insure their safety under all conceivable circumstances. The Sheriff discharged his duty.

But even if it could be said that Sheriff Wheat was vicariously liable for some failure by Jailer Touchstone to discharge the duty of care which the Sheriff owed Morrison, it cannot be said that the breach of the duty of care was the proximate result of Morrison's death. Dr. Petcher testified on the stand that, in his opinion, the cause of Morrison's death was acute cardiac failure. This opinion differed from that reached by the state forensic science laboratory which performed the autopsy on Morrison. The state forensic science laboratory determined

that the cause of death was "acute alcohol abstinence syndrome." The two diagnosis, as the plaintiff recognizes in her posttrial brief, are not inconsistent.

Acute cardiac failure is unpredictable and unforeseeable. Even assuming that Sheriff Wheat failed to exercise reasonable care in providing medical attention or supervision to Morrison, no failure on the part of the Sheriff proximately caused the acute cardiac failure. Because the death of Morrison was caused by an acute cardiac failure even assuming that the Sheriff was negligent in some respect, that negligence would not be the proximate cause of Morrison's death. The acute cardiac failure was an unforeseeable superseding cause. A sheriff is required only to take reasonable care of the medical and supervisory needs of his charges. A sheriff does not insure the safety of those who are placed in his jail. Accordingly, the Court finds that nothing which either the Sheriff or his agent, Jailer Touchstone, did negligently cause the death of Sylvester Morrison, Jr. on November 9, 1978.

III. Order

It is hereby ordered that the claims against Sheriff Wheat be dismissed with prejudice.

Costs are taxed against the plaintiff.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 79-0632-H

BERTHA MORRISON,

Plaintiff,

vs.

WASHINGTON COUNTY, ALABAMA, *et al.*,

Defendants.

ORDER

This order will address the pending state-law claim for wrongful death under Ala. Code § 6-6-410 (1975).

I. Jurisdictional Defects

Several defendants have moved to dismiss the wrongful death claim on the ground that this Court lacks subject-matter jurisdiction over all of the defendants except Sheriff Wheat. The defendants argue that the decision of the Supreme Court in *Aldinger v. Howard*, 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976), mandates that the state claim be dismissed because all defendants except Sheriff Wheat are now pendent parties. In *Aldinger* the plaintiff coupled her civil-rights claim under 42 U.S.C. § 1983 against county officials with a state-law claim against the county itself. The claim against the county sought damages against the county under the theory of *respondeat superior*. At the time the claims in *Aldinger* arose no 1983 claim was recognized against counties. *But see Mondell v. Department of Social Services*, 436 U.S. 658 (1978). Thus, the plaintiff in *Aldinger* sought to obtain federal court jurisdiction over the state-law claim against the county through the doctrine of pendent-party jurisdiction. The plaintiff reasoned that, since jurisdiction existed over the county official through 28 U.S.C. § 1343

(3), because her claims against the county official and the county itself arose from the same nucleus of operative facts, then she should be allowed to obtain pendent-party jurisdiction over the county. The rationale which led the Supreme Court to conclude that pendent-party jurisdiction was inappropriate was rooted in the recognition that, at the time, a county was not a *person* within the meaning of section 1983. Therefore, the Supreme Court reasoned that a state-law claim against the county could not be joined with the federal claim against the county officials in federal court because the scope of federal jurisdiction did not extent far enough to include the state-law claim against a party who could not otherwise be joined.

The factual situation in *Aldinger* is significantly different from the factual situation in the case at bar. All the defendants in this lawsuit were subject to federal jurisdiction. The wrongful death claim was injected into this lawsuit under the familiar analysis found in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). After discovery was completed the court entered summary judgment in favor of all defendants (except Sheriff Wheat) on all federal claims. Moreover, the federal claims in this lawsuit were substantial. *Cf. Haggans v. Lavine*, 415 U.S. 528, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974) (a substantial federal ground will support jurisdiction over a pendent statutory claim which is related to the federal ground.) The federal claims in this case were not pled in a frivolous effort to obtain pendent-party jurisdiction.

In the case at bar only Sheriff Wheat has a remaining federal claim to be tried before the jury. It does not follow, as the other defendants urge, that the dismissal of the federal claims against them divest this Court of subject-matter jurisdiction over the wrongful death claim against them. The federal statutory claims against them were non-frivolous. *Unlike Aldinger*, this was not a situation where this Court would not otherwise have had

subject-matter jurisdiction over claims asserted against the defendants (except Wheat). The 1983 claims against Wheat and the wrongful death claim against the other defendants involve the same basic facts. Judicial economy and convenience would be served by trying all of the claims together.

The Fifth Circuit has recently examined a pendent-party situation which is closely analogous to the facts in this case. In *Boudreaux v. Puckett*, 611 F.2d 1028 (5th Cir. 1980), the court concluded that pendent-party jurisdiction was proper even after the two defendants against whom the federal claims had been pled were out of the lawsuit. The facts in *Boudreaux* presented a less compelling basis for asserting jurisdiction over the state claims than do the facts in the case at bar. In the case at bar there are still pending federal claims *and* all of the defendants in this case were initially alleged to have violated the same federal rights. In short, the Court holds that nothing which the Supreme Court said in *Aldinger v. Howard* forecloses this Court from adjudicating the wrongful death claim of Bertha Morrison against the defendants who are not faced with liability under any federal claim.

II. Motions for Summary Judgment

It is ordered that the motion to strike which the defendant Washington County Hospital Association, Inc. filed is denied. The affidavits of Earline McRae and David Knott, M.D. comply with the requirements of Fed. R. Civ. P. 56(e). Both affidavits affirmatively show that the affiants are competent to testify in light of their qualifications, that their testimony is based upon their opinion as experts under Fed. R. Evid. 703, and that the affidavits disclose the facts which form the basis of their expert opinions.

The motion for summary judgment which the Washington County Hospital Association, Inc. filed is denied.

A genuine issue of fact is raised as to whether the nurses at the Washington County Hospital adequately discharged any duty which they may have owed Sylvester Morrison to make an independent evaluation of the wisdom to discharge Morrison from the hospital to the county jail.

The Court notes that the duty, if any, which the nursing staff owes a patient was not briefed by the parties. The Court would expect this issue to be thoroughly briefed in the trial briefs which the parties are ordered to submit.

The motion of Dr. Paul Petcher for summary judgment is likewise denied. A genuine issue as to material fact remains: Did Dr. Petcher fail to discharge the duty of care which he owed to Sylvester Morrison?

DONE this 6th day of February, 1981.

/s/ W. B. Hand
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 79-0632-H

BERTHA MORRISON,
Plaintiff,

v.

WASHINGTON COUNTY, ALABAMA, *et al.*,
Defendants.

ORDER

It is hereby ORDERED that the Court's previous ruling of October 7, 1980, in which it found Sheriff Wheat liable for violation of 42 U.S.C. § 1983, be vacated. Accordingly, those portions of the Order which deal with Sheriff Wheat from page 16 through page 22 are hereby vacated.

Since the case against Sheriff Wheat will be tried before a jury, there is no reason to dismiss the pendant-state claim for wrongful death. Therefore, it is hereby ORDERED that page 25 and that portion of page 26 which deals with the pendant-state claim be vacated. The case of Bertha Morrison against *all of* the defendants on the question of wrongful death will be tried to a jury.

The Court will allow the parties leave to file motions for summary judgment as to the wrongful death claim. The previous motions for summary judgment contained language which was broad enough to encompass the pendant-state claim. However, with the exception of the Washington County Hospital Association, Inc., no party addressed the pendant-state claims in their brief. If any defendant, including the Washington County Hospital As-

sociation, Inc., wishes to renew its motion for summary judgment as regards the wrongful death claim, they may do so by filing the appropriate motion, supported by a brief and proposed Findings of Fact and Conclusions of Law, no later than December 31, 1980. The plaintiff must respond to any motion for summary judgment as regards the wrongful death claim by January 23, 1981.

It is further ORDERED that this case is set for trial on the jury term which shall commence March 23, 1981.

DONE this 12th day of December, 1980.

/s/ W. B. Hand
W. B. HAND

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 79-0632-H

BERTHA MORRISON,

Plaintiff,

vs.

WASHINGTON COUNTY, ALABAMA, *et al.*,

Defendants.

MEMORANDUM OF DECISION

The federal claims in this case arise under the Civil Rights Act of 1871, Rev. Stats. § 1979 (1875), and a pendent state claim arises under Alabama's wrongful death statute, Ala. Code § 6-5-410 (1975). All of the defendants, with the exception of Washington County, have moved for summary judgment on all of the claims. For the reasons set forth below,[1] the Court holds: 1) that

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[1] The plain language of the Federal Rules of Civil Procedure do not require a court to enter findings of fact or conclusions of law when it enters summary judgment. Fed. R. Civ. P. 52(a) provides in part, that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." Yet "even when the rules do not require that findings of fact and conclusions of law be issued, a concise statement by the district court of the grounds for its decision is desirable." Huckeby v. Frozen Food Express, 555 F.2d 542, 545 n.4 (5th Cir. 1977); *see* Hanson v. Aetna Life & Cas., No. 78-3661, slip. op. at 9113 (5th Cir. Sept. 4, 1980) ("[W]e have in practice insisted that district courts record—however informally—their reasons for entering summary judgment, at least where their underlying holdings would otherwise be ambiguous or inascertainable."); Stone v. Board of Regents, 620 F.2d 526, 528 (5th Cir. 1980); Jackson v. Marine Exploration Co., Inc., 614 F.2d 65, 66-67 (5th Cir. 1980); Alabama v. Seeber, 502 F.2d 1238, 1242 n.3 (5th Cir. 1974) (district court should supply reasons); Melancon v. INA, 482 F.2d 1057, 1959 n.4 (5th Cir. 1973) (state reasons);

summary judgment is granted as to all defendants, except Washington County, on the claims under 42 U.S.C. §§ 1985(3) and 1986; 2) that summary judgment is granted as to all defendants, except Washington County and Sheriff Wheat, on the claim under 42 U.S.C. § 1983; 3) that summary judgment is granted to the plaintiff, a non-moving party, on the issue of the liability of Sheriff Wheat under the claim under 42 U.S.C. § 1983; and 4) that the pendent state claim under Alabama's wrongful death statute is dismissed without prejudice.

I. The Facts

A. The Hospital

This case involves the tragic death of Sylvester Morrison, Jr. On November 7, 1978, Sylvester Morrison [hereinafter the *decedent*] was admitted to Washington County Hospital. Morrison came to the hospital at noon in order to seek treatment of a severe diabetic condition from which he suffered. Although Morrison was admitted by Dr. Patterson at the emergency room, Dr. Petcher was the attending physician. Dr. Petcher continued to treat Morrison on November 8, 1978, the second day of the decedent's stay at Washington County Hospital. On November 8th, Dr. Petcher diagnosed the decedent as suffering from both delirium tremens and diabetes mellitus. After diagnosing that the decedent suffered from delirium tremens at about 9:00 a.m. in the morning, Dr. Petcher had members of the nursing staff telephone some family members of the decedent. Family members were telephoned in the hope that one of them would come to the hospital and sit with the decedent and aid the hospital

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Mosley v. Ogden Marine, 480 F.2d 1225 (5th Cir. 1973) (district court should make clear which theory it relied upon in granting motion for summary judgment); Steed v. Central of Georgia Ry. Co., 477 F.2d 1303, 1305 (5th Cir. 1973) (district court should "elucidate its rationale"). This short memorandum of decision adequately informs the appellate court of this Court's rationale in a concise manner.

staff in nursing the decedent and controlling his violent behavior during his withdrawal from alcohol.

The record is unclear as to whether the nursing staff was able to contact members of the family initially. However, by 3:20 p.m. on the afternoon of November 8, 1978, hospital records show that family members had contacted the hospital. Deposition of Dr. Paul Petcher at 31.

Late that afternoon, around 6:00 p.m., Dr. Petcher meet with five family members at the hospital. *Id.* at 32. Dr. Petcher explained to the various family members that their help was needed in caring for Mr. Morrison, and that if they refused to help care for Mr. Morrison at the hospital the doctor might be forced to discharge Mr. Morrison to his family. *Id.* at 34. None of the five family members who met with Dr. Petcher were willing to stay at the hospital.

After the family refused to help, despite repeated requests, *id.* at 38, Dr. Petcher explored other alternatives for controlling Morrison short of sending him to the county jail, one of the alternatives which Dr. Petcher had discussed with the family. Dr. Petcher spoke with a psychologist at the Washington County Mental Health Unit, Ray Sasser. *Id.* at 38. Dr. Petcher explored the possibility with Mr. Sasser of transferring Morrison from the Washington County Hospital to a mental health center such as Searcy Hospital in Mount Vernon, Alabama or the University of South Alabama Hospital in Mobile, Alabama for treatment in a mental health ward. Dr. Petcher learned that it would be impossible to transfer Morrison without a commitment hearing. *Id.* at 39. Dr. Petcher concluded that the only viable alternative left open to him was the Washington County jail if Morrison became unmanageable.

To Dr. Petcher, it was clear that the family's decision was that the doctor discharge the decedent to a jail if it became impossible to supervise him at the hospital. *Id.*

at 56. This was preferred by the family over the alternatives of staying at the hospital and helping with the nursing or taking the decedent home. *Id.* at 34. It appears from the record that Morrison's mother suggested to Dr. Petcher that the doctor intern Morrison in the county jail. *Id.* at 40-41.

As the day of November 8th progressed Morrison had become increasingly violent. "[H]e pulled the I.V. out of his arm." *Id.* at 35. He was talking to himself, and he reported seeing insects on the walls. Deposition of Jean Young at 23. By the early evening Morrison was "irrational and uncontrollable", Deposition of Sarah Lankford at 6, throwing a lounge chair across his hospital room, *id.* at 17. Morrison had been locked in a private room in an effort to protect other patients and the hospital staff. Deposition of Jean Young at 9.

The family members who had arrived at the hospital at 6:00 p.m. left at 7:00 p.m. *Id.* at 23. By 7:25 p.m., Dr. Petcher had instructed the nursing staff to prepare Morrison for discharge. Deposition of Sarah Lankford at 8-9. The record is unclear as to who contacted the Washington County Sheriff's Department. Deposition of Jesse Touchstone at 11-12. At any rate, the record is crystal clear that the *decision* to discharge Morrison if he became unmanageable was made by his family and that the *instruction* to discharge Morrison was made by Dr. Petcher without consulting any members of the nursing staff, the hospital staff, or the local police or sheriff departments.

As with most civil rights cases, the race of the actors is important. Morrison is Negro. Dr. Petcher, the nursing staff, Sheriff Wheat, and Jailer Touchstone are Caucasian.

A Chatom police officer, Officer Bickerstaff, and Alabama Highway Patrolman Michael Barnett came to the hospital around 8:00 p.m. *Id.* at 8. When they arrived Morrison was wheeled from his hospital room in a wheelchair and placed in a squad car. Deposition of Dr. Paul

Petcher at 57. Dr. Petcher recalls directing the police officers to check on the condition of Morrison once each hour. *Id.* at 57. Morrison was sedated when he was turned over to the two law enforcement officers. *Id.* at 57.

When Dr. Petcher turned over Morrison to the two police officers, he did not tell the officers that Morrison was being charged with any criminal offense. Dr. Petcher's "only intent was to take care of the man until the next day when he was [able to be commited to a mental institution.]" *Id.* at 58. Dr. Petcher did not direct the police officers to charge Morrison with any criminal offense. *Id.* Nor did Dr. Petcher describe Morrison as a drunk to the two officers. *Id.* at 60. However, despite this information, the police treated Morrison as though he was being arrested for drunkeness.[2] As between Dr. Petcher

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[2] Someone at the hospital had telephoned the Sheriff's office asking to have a police officer sent to the hospital. Deposition of Jesse Touchstone at 11. The jailer who answered the phone was told there was "a disturbance or something out there [at the hospital] like that." *Id.* at 13. Because the hospital was within the police jurisdiction of the Chatom City Police, the jailer forwarded the request for assistance to the Chatom City Police. He also contacted Trooper Michael Barnett of the Alabama Highway Patrol. *Id.* at 11. When Officer Bickerstaff and Trooper Barnett turned Morrison over to Jailer Touchstone, the jailer assumed Morrison was intoxicated. *Id.* at 10. Neither officer told the jailer Morrison was intoxicated. *Id.* Nor did either officer convey Dr. Petcher's instructions to the jailer. Deposition of Dr. Petcher at 57-59.

When Officer Bickerstaff telephoned Sheriff Wheat for permission to incarcerate Morrison at the county jail Bickerstaff told the sheriff that Morrison was intoxicated. Deposition of Sheriff Wheat at 9, 14. The Sheriff concluded that Officer Bickerstaff had arrested Morrison for "public drunk," [*sic*] *id.* at 15, l. 15, although Bickerstaff did not *tell* the sheriff that Morrison was *charged* with a crime, *id.*, at 31, l. 21-22. Thus, the uncontroverted record shows that Dr. Petcher told Officer Bickerstaff that Morrison was not to be charged with a criminal offense, that Officer Bickerstaff, for some reason, told Sheriff Wheat that Morrison was a public drunk, and that nobody said anything to Jailer Touchstone. The jailer reached his own conclusions.

and Officer Bickerstaff, something was lost in the translation.

Before Chatom Police Officer Bickerstaff took Morrison to the Washington County jail he contacted Washington County Sheriff William Wheat. Deposition of William Wheat at 9. Wheat was at home that evening. Bickerstaff "told [Wheat] that he had a drunk out at the hospital and that the doctor had talked to the mental health man and they had set up for a hearing to get with the judge the next morning to have a commitment hearing and that they needed to bring him to the jail to hold him until the next morning until they could have the hearing." *Id.* at 9. When Officer Bickerstaff asked Sheriff Wheat whether Morrison should be placed in the county jail Sheriff Wheat said "to go ahead." *Id.* at 10, l. 6. Any person whom the Chatom City Police arrested was jailed at the Washington County jail. *Id.* at 8. In fact, Morrison was never charged with any crime. *Id.* at 21.

Officers Bickerstaff and Barnett arrived at the Washington County jail around 8:30 or 9:00 p.m. on the evening of November 8, 1978. Deposition of Jesse Touchstone at 9. The record is unclear whether the two officers used the same car or whether they used different cars. If different cars were used by both officers it is unclear which officer physically transported Morrison to the jail. Deposition of Sheriff Wheat at 20.

When Bickerstaff and Barnett brought Morrison to the jail they directed Touchstone to place Morrison in a cell. Deposition of Jesse Touchstone at 10. At the time Morrison was first presented to Touchstone, the jailer concluded that Morrison was drunk because of "the way he was hollering and cutting up." *Id.* at 10. Morrison was "just wanting to go home; he said he had to go; had to go to work for Dr. Petcher." *Id.* At that point the jailer placed Morrison in a cell.

Jesse L. Touchstone, the jailer at the county jail, who was on duty when they arrived, had been employed as a

jailer for the past five years. He had a third grade education. *Id.* at 4. The jailer did not know whether Morrison had been charged with a crime. The procedure at the Washington County jail was to have the arresting officer fill out the docket sheet; the jailer ordinarily did not see the docket sheet. *Id.* at 9-10.

After Morrison had been placed in the cell, according to Touchstone, "he just—just like a drunk person. . . . Well, he didn't go to sleep; he kept beating and knocking and hollering, wanting to go home. He wanted to call his wife and he couldn't even tell me his phone number . . . . I taken him to be drunk." *Id.* at 14. The jailer did not know whether Morrison had been charged with a crime. He did not ask Officer Bickerstaff or Trooper Barnett why Morrison was in jail. And he was not given any medicine to administer to Morrison. *Id.* at 14.

Several times during the early morning hours of November 9, 1978 the jailer offered water to Morrison or spoke with Morrison in an effort to calm him. Morrison was talking incoherently, saying that he wanted to go home because he had to go to work. *Id.* at 16. He beat the walls of his cell with his fist, and he bumped his head against the glass window in the cell. *Id.* at 17. During all of this Touchstone continued to believe that Morrison was simply drunk. *Id.* at 17.

The last time Touchstone saw Morrison alive was at 4:00 a.m. on the morning of November 9, 1978. Morrison was still knocking on his cell walls at that time. After checking on Morrison, Touchstone returned to his guard station. He noticed that Morrison had gotten quiet. Touchstone again returned to Morrison's cell to check on Morrison. When Touchstone opened the cell door he "saw there was something wrong with [Morrison] . . . ." *Id.* at 22. Touchstone left the cell and returned to his post to retrieve a flashlight. After retrieving the flashlight he went back to the cell. He "opened the food hole to where I could look and see and be sure. I just knowed [*sic*]

there was something wrong before I called the sheriff." *Id.* at 22. Touchstone made no effort to apply first aid. "I didn't open the door [to the cell]; I just opened the food door and I got and called the Sheriff." *Id.* at 23. After spending approximately eight hours at the Washington County jail, Morrison was dead.

C. Official Policies and Custom of the Sheriff

When a person was jailed for being intoxicated the policy of the sheriff was this:

> The only policy we have is we usually try—if they're drunk, we put them as near to theirself [*sic*] as we can instead of putting them back with a lot of the older prisoners that [*sic*] had [*sic*] been there a long time.

Deposition of Sheriff Wheat at 22. The sheriff's policy on providing medical attention to prisoners was:

> If the [arresting] officer thinks that—or the jailer thinks that they should have some medical treatment or be checked by a medical doctor, then they carry them to the hospital or the clinic.
>
> . . . .
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> Usually [drunks] are just brought to the jail, unless they've been in a wreck or something like that, and put in a cell and the jailer checks by them so often. And then they usually sober on up and [*sic*] ready to get out.

Id. at 23. The deposition testimony of the sheriff was that the jailer would check the cell of an intoxicated person on an hourly basis. *Id.* at 24.

It was a regular practice of the sheriff to hold people with mental health problems at the jail until commitment hearings could be scheduled in state court. Apparently, this was done, as a practice and policy of the sheriff, when

no judicial order had issued authorizing commitment. *Id.* at 24-26. In short, Morrison was treated the same as any drunk would be treated. *Id.* at 24.

Jailer Touchstone agreed that Morrison "acted like all the other drunks that come [*sic*] in," Deposition of Jesse Touchstone at 29, and that he treated Morrison by following the usual practice of the jail: refraining from calling for medical help in response to Morrison's physical reaction because he did not suffer from a "cut or something like that," *id.* at 27.

D. The Parties

This action was filed on November 7, 1979 by Ms. Bertha Morrison, administratrix of the estate of Sylvester Morrison, Jr. The defendants are William Wheat, Sheriff of Washington County, in his individual and official capacity; each of the Washington County Commissioners in their individual and official capacities; Washington County; the Washington County Hospital Association, Inc.; and Dr. Paul Petcher.

The Washington County Hospital Association, Inc. is governed by a seventeen-member board of directors. The board of directors is appointed by the Washington County Commission. The hospital receives tax revenues to help support its operations. Deposition of Hiller Dickerson at 15. The hospital has thirty beds. It presently has three active physicians, including Dr. Petcher, on the staff. *Id.* at 14. Two others, a retired physician and a local dentist, are members of the courtesy medical staff at the Washington County Hospital. *Id.* at 16.

Physicians on the staff have the privilege of using the hospital facilities. However, they act as private physicians. Staff physicians are not employees of the hospital. *Id.* at 53. "Patients [are] discharged only on written order of the attending physician." *Id.* at exhibit A of the Rules and Regulations no. 17 [hereinafter *Rule 17*]. No

regulation or custom of the hospital directs doctors to discharge unruly patients to the county jail. Public funds support both the hospital and the county jail.

II. Conclusions of Law

The complaint alleges four causes of action. One cause of action is alleged under 42 U.S.C. § 1985(3) for a conspiracy, another cause of action is claimed under 42 U.S.C. § 1986 alleging negligence for failing to prevent a conspiracy under § 1985(3), a third cause of action is alleged to be under 42 U.S.C. § 1983, and a fourth claim is alleged under Alabama's wrongful death statute. Ala. Code § 6-5-410. All of the defendants, except Washington County, have moved for summary judgment as to all of the claims.[3]

A. The Claim Under § 1985(3)

The Court begins its analysis with the claim under 42 U.S.C. § 1985(3).[4] A claim under § 1985(3) does not re-

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[3] *See* pp. 22-24 & notes 14 & 15 *infra* (discussing the manner in which the Court will treat Washington County).

[4] Section 1985(3) provides:

> (3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein

quire state action. However, as an essential element, "there must be some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1790, 1798, 29 L. Ed. 2d 338 (1971); *Sims v. Jefferson Downs, Inc.*, 611 F.2d 609, 613-14 (5th Cir. 1980); *Baskin v. Parker*, 602 F.2d 1205, 1206-07 (5th Cir. 1979). Absolutely not one scintilla of evidence establishes that any racial animus or other class-based, invidiously discriminatory animus existed in this case.

Dr. Petcher and all of the attending nurses at the Washington County Hospital were Caucasian. Sheriff Wheat and Jailer Touchstone were Caucasian. Morrison was a Negro. However, there is not a scintilla of evidence in the record which shows that the decision to transfer Morrison from the hospital to the county jail was rooted in racially discriminatory animus. In fact, every participant who was asked expressly denied any racial animus played any part in the decision to transfer Morrison.

The plaintiff argues that the simple difference in skin color between Morrison and the defendants is sufficient circumstantial evidence from which one could infer the necessary racial animus. The Court rejects this argument as being unfounded in either fact or experience. In fact, the deposition testimony of Dr. Petcher shows that he served as a physician in Nigeria from 1951 to 1954 and again from 1956 to 1960. For the seven years during which he served as a physician-missionary in Nigeria he was the only doctor for 250,000 people. Deposition of Dr.

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do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

Petcher at 4. Rather than being a racist, the man is more accurately described as a saint.

Nothing in the record indicates that the treatment afforded Morrison was class-based. The Washington County Hospital, as a practical matter, is so small and limited that any unusual problem such as the one presented by Morrison was likely to be unique. Indeed, the record shows that this was the first instance in which a family refused to help nurse another member of the family when the hospital requested help. The manner in which Dr. Petcher chose to resolve the problem with which he was faced may well have amounted to malpractice[5] or false arrest,[6] but it does not amount to a violation of the civil rights conspiracy statute. Accordingly, the Court holds that the motion for summary judgment filed by all defendants (except Washington County) is granted as to the § 1985(3) claim.

B. The Claim Under § 1986

The complaint also alleges a cause of action under 42 U.S.C. § 1986. That section provides:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceeding section [42 U.S.C. § 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be re-

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[5] The joint pretrial order which the parties filed on August 29, 1980 recognized that a medical malpractice claim might be maintained against Dr. Petcher on these facts. Pretrial Order at 1.

[6] Arrests by private persons are governed by Ala. Code § 15-10-7 (1975).

> covered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. § 1986. Because the Court held that the plaintiff has failed to establish a conspiracy under § 1985(3) it necessarily follows that the claim under § 1986 must also fail. *Dowsey v. Wilkins*, 467 F.2d 1022, 1026 (5th Cir. 1972). Therefore, the Court holds that summary judgment in favor of all of the defendants except Washington County is granted as to the claim for relief under § 1986.

C. The Claim Under § 1983

In order to be entitled to relief under § 1983 [7] the plaintiff must show 1) that the defendant deprived him of a right secured to him by the Constitution or federal law and 2) that the deprivation occurred under color of state law. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155

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[7] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

(1978); *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 150 (1970); *White v. Scrivner Corp.*, 594 F.2d 140, 141 (5th Cir. 1979).

1. Washington County Hospital Association, Inc.

Without doubt the hospital acts under color of state law. A board of directors, which is appointed by the publically-elected county commission, governs the hospital. The hospital is supported by public tax dollars. In short, the hospital is engaged in state action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

However, as pointed out above, in order to be liable for violation of § 1983 the defendant must deprive the plaintiff of a right, privilege or immunity secured to him by the Constitution or federal laws. In this case the hospital took no action. Dr. Petcher was the actor. A state entity is not liable under the respondeat superior theory unless its agent acted pursuant to the direction, custom, or policy of the superior. *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Baskin v. Parker*, 602 F.2d 1205 (5th Cir. 1979). Here Dr. Petcher was not an employee of the hospital. Deposition of Hiller Dickerson at 53. Nor was he acting pursuant to a custom, policy, or practice of the hospital in discharging Morrison to the police. For instance, there was no regulation promulgated by the hospital or its governing board which required unruly patients to be turned over to the police. Dr. Petcher acted by himself in deciding to discharge Morrison. Rule 17, which authorized an attending physician to discharge a patient, *see* p. 9 supra (text of Rule 17), did not compel Dr. Petcher to follow the course of action he chose to follow. *Martinez v. California*, 444 U.S. 277 (1980) (no state action where parolee murders a person after release from prison). It set no custom, policy, or practice which resulted in the abridgement of Morrison's federally secured rights. *Cf. Adickes v. S. H. Kress and Co.*, 398

U.S. 144 (1970); *Wanger v. Bonner*, 621 F.2d 675, 683 (5th Cir. 1980) (an employer is liable under § 1983 for acts of employee only where employee acts pursuant to official policies and customs). Therefore, the Court holds that nothing which the hospital did deprived Morrison of any right, privilege or immunity secured by the Constitution or federal laws; no custom, practice, or policy operated which resulted in Morrison being sent to the county jail. *Waters v. City of Ocean Springs*, No. 80-3192, slip op. at 158 (5th Cir. Oct. 3, 1980) (applying *Monell's* requirement that liability of municipality attaches under § 1983 only where execution of governmental policy causes injury). As to the hospital, the plaintiff's claim under § 1983 fails, and summary judgment is hereby entered in favor of the defendant hospital.

2. The Washington County Commission

Jack Armstrong, as Probate Judge, Ed Turner, Leonard Sullivan, Bodie Carpenter, and Sherwood Dees, as commissioners of Washington County, are named as defendants in their individual capacities. As in the case of the hospital, state action is present. The commissioners derive their authority from state law.

Again, as with the hospital, the commissioners were not the actors who discharged Morrison to the police. Nor were they the actors who decided that Morrison should be discharged. Dr. Petcher made the decision to discharge Morrison. The decision of Dr. Petcher was not based on any custom, policy, or practice established by the commission. The commission did not, either formally or informally, set any policy requiring unruly patients to be discharged in the middle of the night to the police. The decision to discharge Mr. Morrison to the police was made by Dr. Petcher. No one else participated. Thus, the Court holds that the commissioners in both their individual and representative capacities are entitled to summary judg-

ment on the § 1983 claim brought by the plaintiff.[8] *Martinez v. California*; *Monell v. Department of Social Services*; *Waters v. City of Ocean Springs*, No. 80-3192 (5th Cir. Oct. 3, 1980); *Baskin v. Parker*.

3. Dr. Paul Petcher

The § 1983 claim against Dr. Petcher also fails. Dr. Petcher did not act under color of state law. "[A] State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." *Flagg Brothers, Inc., v. Brooks*, 436 U.S. 149, 164 (1978); *Waters v. St. Francis Hospital, Inc.*, 618 F.2d 1105, 1107 (5th Cir. 1980) (a state statute which *authorizes* a private hospital to revoke staff privileges of doctors does not *compel* revocation of privileges so that if a private hospital chooses to revoke staff privileges there is no state action). Nothing which the hospital or the county commission did compelled Dr. Petcher to take the action which he took. The State, in short, did not put its weight behind the private action of Dr. Petcher. Nor did Dr. Petcher consult with any hospital administrator before deciding to discharge Morrison. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 146 (1970) (private persons who act jointly with state official in prohibited conduct are liable under § 1983); *cf. Sparks v. Duval County Ranch, Inc.*, 604 F.2d 976 (5th Cir. 1979) (en banc) (private conduct becomes state action where there is a conspiracy

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[8] The defense of qualified immunity was not raised by any of the defendants. *See, e.g.*, Procunier v. Navarette, 434 U.S. 555 (1978) (qualified immunity for prison officials and officers); Imber v. Pachtman, 424 U.S. 409 (1976) (absolute immunity for prosecutors in initiating and presenting the state's case); O'Connor v. Donaldson, 422 U.S. 563 (1975) (qualified immunity for superintendent of state hospital); Wood v. Strickland, 420 U.S. 308 (1975) (qualified immunity for local school board members); Scheuer v. Rhodes, 416 U.S. 232 (1974) (qualified "good-faith" immunity for state governor and other executive officers for discretionary acts performed in the course of official conduct).

with a state official). Thus, the Court holds that the plaintiff may not properly characterize the conduct of Dr. Petcher as state action by arguing that the hospital authorized or encouraged his conduct. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. at 165. No state action was involved in the decision by Dr. Petcher to discharge Morrison to the police. The conduct of Dr. Petcher was wholly private. *Martinez v. California*, 444 U.S. 277 (1980). Therefore, the remedy which § 1983 affords is not available against Dr. Petcher. Summary judgment is granted as to the § 1983 claim in favor of the defendant Dr. Paul Petcher.

4. Sheriff Wheat

a. The Arrest

Sheriff Wheat is the paradigm of state action. His authority is come by because of his badge, his gun, and the other indicia of office bestowed on him as Sheriff of Washington County. Because of the peculiar facts of this case, the Sheriff is unable to use as a shield the holding in *Monell* that § 1983 did not create a federal law of respondeat superior. 436 U.S. at 693; *Baskin v. Parker*, 602 F.2d 1205, 1207-08 (5th Cir. 1979).

The facts in this case are that Officer Bickerstaff contacted Sheriff Wheat at his home at 8:00 p.m. on November 8, 1978 before taking Morrison from the hospital to the county jail to clear the action with the sheriff and to get his permission. The sheriff authorized the seizure and incarceration of Morrison. This was a warrantless arrest wholly unauthorized under Alabama law[9] in viola-

[9] Under Alabama law, a warrantless arrest by a duly authorized law enforcement officer is governed by Ala. Code § 15-10-3, which reads:

> Arrest without warrant—When and for what allowed.
>
> An officer may arrest any person without a warrant, on any day and at any time, for:

tion of the liberty guarantee afforded by the fourteenth amendment. Hence § 1983 affords a remedy for vindication of the right. *Waters v. City of Ocean Springs*, No. 80-3192, slip op. at 157-58 (5th Cir. Oct. 3, 1980); *Reeves v. City of Jackson*, 608 F.2d 644, 650 (1979). Thus, while the sheriff was not the arresting officer, he is vacariously liable for the acts of his agents because they acted pursuant to his direction. The sheriff was an active participant in the unconstitutional arrest of Morrison. *Wanger v. Bonner*, 621 F.2d 675, 679 (5th Cir. 1980) (explaining *Baskin v. Parker*).

b. The Confinement

As with the liability which flows to the sheriff because of the acts of Officers Bickerstaff and Barnett, so too is the sheriff liable for the death of Morrison once Morrison was interned in the county jail. The policy which the sheriff endorsed with regard to providing medical attention for people who were arrested imposes liability upon the sheriff under § 1983 for the death of Morrison. The sheriff's policy was to put those who were arrested for intoxication in a cell by themself and to leave to the discretion of the arresting officer or the jailer the decision to provide medical attention. Likewise, the decision to

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(1) Any public offense committed or a breach of the peace threatened in his presence;

(2) When a felony has been committed, though not in his presence, by the person arrested;

(3) When a felony has been committed and he has reasonable cause to believe that the person arrested committed it;

(4) When he has reasonable cause to believe that the person arrested has committed a felony, although it may afterwards appear that a felony had not in fact been committed; or

(5) On a charge made, upon reasonable cause, that the person arrested has committed a felony.

Ala. Code § 15-10-3 (1975).

provide medical attention to those who were arrested on other charges was delegated by the sheriff to his jailer.

To compound the problem, Touchstone, who was supposed to check the cell of any person who was jailed for intoxication, had no medical training. As a consequence, he was unable to make an informed judgment as to whether a prisoner needed medical attention. The affirmative policy of the sheriff in delegating authority to the arresting officers and the jailer to decide whether to seek medical attention for a prisoner whom they thought was intoxicated—as both Bickerstaff and Touchstone assumed Morrison was—makes Sheriff Wheat liable if the eighth amendment's guarantee that a prisoner not be subjected to " 'unnecessary and wanton infliction of pain,' " through deliberate indifferenec to his serious medical needs, was violated. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976)). This conclusion is further buttressed by his policy of allowing people to be jailed, without any judicial process, while they await a commitment hearing. The death of Morrison was a foreseeable consequence of the policies and practices which the sheriff adopted for his jail. *But see, Martinez v. California*, 444 U.S. 277 (1980).

C. Summary Judgment

It was Sheriff Wheat who moved for summary judgment, asserting "no genuine issue as to any material facts [exists] and that [he] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court agrees that the record does not show any dispute of fact as to the involvement of Sheriff Wheat. However, contrary to the conclusion of Sheriff Wheat, the record establishes liability under § 1983 for both the warrantless arrest and the callous and conscious indifference to Morrison's serious medical needs. Were the Court to stop here with its

analysis, summary judgment would properly be entered against Sheriff Wheat and in favor of the plaintiff, a non-moving party.[10]

d. Defense of Qualified Immunity

Nowhere in either his answer [11] or in the pretrial order which this Court has entered [12] does Sheriff Wheat raise the affirmative defense of qualified immunity. He would be entitled to the defense, depending upon his state of mind. *Procunier v. Navarette*, 434 U.S. 555 (1978) (qualified immunity for prison officials and officers); *Pierson v. Ray*, 386 U.S. 547, 555-58 (1967) (defense of good faith available to police officers in § 1983 action); *Reeves v. City of Jackson*, 608 F.2d 644, 652 n.3, (5th Cir. 1979) ("good faith immunity inheres in the record

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[10] Fed. R. Civ. P. 56 does not expressly address the granting of summary judgment in favor of a non-moving party. The only direction offered by Rule 56 is the two-pronged test which must be followed in granting the motion: "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). One commentator is of the opinion "that a cross-motion is not a prerequisite to the entry of a judgment for the non-moving party . . . ." 6 Moore's Federal Practice § 56.12, at 56-331 (2nd ed. 1948) (summary judgment for non-moving party). The modern rules of federal pleading emphasize the power of a court to do justice rather than elevating the form of the pleadings over substance. *Compare* Fed. R. Civ. P. 54(c) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if* the party has not demanded such relief in his pleadings.") (emphasis added) *with* Fed. R. Civ. P. 56(c) (no material facts in dispute). No material facts are genuinely disputed in this case.

[11] The answer from Sheriff Wheat was filed on December 10, 1979, twenty-two days after the complaint was filed with the Clerk's office. Sheriff Wheat was served with process on November 12, 1979. He filed his motion for summary judgment on August 5, 1980.

[12] The pretrial conference in this case was held on September 3, 1980. The parties submitted a joint pretrial document to the Court on August 29, 1980.

as a matter of law"); *Cruz v. Beto*, 603 F.2d 1178, 1182-84 (5th Cir. 1979) (it is plaintiff's burden in piercing defense of good faith to establish that the defendant official acted recklessly or in a grossly negligent manner); *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978) (leading case of qualified immunity).

The sheriff could escape liability as an individual under § 1983 as long as the actions upon which the § 1983 claim is predicated were taken in the good faith performance of his official duties.

> The Supreme Court explained the good faith standard of *Scheuer* in *Wood*, setting up two tests, one objective and one subjective. Under the alternative *Wood* formulations, an official is personally liable for actions taken while discharging his official responsibilities only if:
>
> > [1] [H]e knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [individual] affected, or [2] if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [individual]. That is not to say that [officials] are "charged with predicting the future course of constitutional law."

Familias Unidas v. Briscoe, 619 F.2d 391, 403 (5th Cir. 1980) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (citation omitted)). "Since qualified immunity is a defense, the burden of pleading it rests with the defendant. See Fed. Rule Civ. Proc. 8(c) (defendant must plead any "matter constituting an avoidance or affirmative defense"); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1271 (1969)." *Gomez v. Toledo*, 48 U.S.L.W. 4600, 4601 (U.S. May 27, 1980) (No. 79-5601). The decision of the Supreme Court on the burden of pleading was unanimous. "The failure to plead [quali-

fied] immunity waives the affirmative defense. Fed. R. Civ. P. 8(c); *Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 298 n.1 (5th Cir. 1979)." *Boyd v. Carrol*, No. 79-2242, slip op. at 8765 (5th Cir. Aug. 22, 1980) (judge failed to plead defense of absolute immunity). The plaintiff is not required to rebut the defense of qualified immunity unless it is pleaded in the answer. *Gomez v. Toledo*, 48 U.S.L.W. at 4601. The Court need not, and may not, consider the defense in this case.

On November 8, 1978, it was well-established constitutional law that persons have a constitutional right to be free from malicious, warrantless arrest, *Brinegar v. United States*, 338 U.S. 160 (1949) (there must be probable cause to arrest); *see Baker v. McCollan*, 433 U.S. 137 (1979), and to be free from callous and conscious indifference to their serious medical needs while they are in jail, *Estelle v. Gamble*, 429 U.S. 251 (1976). The Court holds that Sheriff Wheat is liable to the plaintiff, in his individual capacity, for damages under § 1983, and it grants summary judgment in favor of the plaintiff, a non-moving party.[13]

As for liability in his representative capacity, that liability attaches only if the law permits an award of damages against the governmental entity whom the officer represents. *Monell v. Department of Social Services*, 436 U.S. 658, 690 n.55 (1978). "Thus, damages may be awarded against a defendant in his official capacity if they would be available against the governmental entity, itself." *Familias Unidas v. Briscoe*, 619 F.2d 391, 403 (5th Cir. 1980). Washington County, as a municipal corporation, is eminently suable under federal law. *See* note 15 *infra* (discussing eleventh amendment immunity vis-a-vis counties). Therefore, the sheriff is liable in both his individual and his representaties capacities.

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[13] *See* note 10 *supra* (discussing entry of summary judgment in favor of a non-moving party).

The only question remaining to be tried to the jury is the question of the amount of the damages which Sheriff Wheat owes the plaintiff. The Court intends to narrowly restrict proof to this single issue.

D. Washington County, Alabama

One of the named defendants in this suit is Washington County, Alabama. The complaint alleges, and, indeed, the record establishes, that Washington County funds, either partially or wholly, the operations of the Washington County Hospital Association, Inc., the Washington County jail, and the Washington County Sheriff's Department.

Service was perfected on the county by serving its agents, Gerald Dennis Porter, who indicated by his signature that he was the county attorney for Washington County on November 14, 1979.[14] To date there has been no appearance on behalf of the county, no responsive pleading filed, and no effort to defend against this law suit. Neither has the plaintiff moved for entry of default. Fed. R. Civ. P. 55(a). The Court is left with the problem of how to treat the defendant Washington County.[15]

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[14] The Marshal's receipt shows that service was made on "10-14-79" on Gerald Porter. That date is obviously incorrect since this law suit was not filed until November 7, 1979. The Marshal's receipts for other defendants show they were served on November 14, 1979. Given those other Marshal's receipts, the Court presumes that service on Washington County was also on November 14, 1979.

[15] Washington County is a proper party under federal law. Since 1890 it has been recognized that counties are subject to suit under federal law and that the eleventh amendment does not serve as a bar. Lincoln County v. Luning, 133 U.S. 529 (1890); *see* Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Downing v. Williams, No. 78-2869, slip op. at 8629 (5th Cir. Aug. 21, 1980) (discussing eleventh amendment immunity).

> Suit is barred only when the state is the defendant. Agencies of the state come under this heading but its political subdivisions do not. Thus municipal corporations, counties and school

Our system of justice is an adversary system. It contemplates that a plaintiff who has a claim will pursue a defendant whom he claims is liable to him with the same vigor and cunning which a fox would use when hunting a rabbit. Our rules of civil procedure reflect this design. While a district court possesses discretion to order the clerk to enter default under Rule 55(a), *Davis v. Parkhill-Goodloe Co.*, 302 F.2d 489 (5th Cir. 1962); *see generally*, 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2682, at 256 (1973), it is the plaintiff, as the master of his law suit, who should ordinarily seek entry of default. The plaintiff is free to name and pursue those whom he thinks are liable to him as he sees fit to do. Where a plaintiff fails to pursue his claims a court has the inherent power to dismiss the claims for failure to prosecute under Fed. R. Civ. P. 41(b). *Link v. Wabash Railroad*, 276 U.S. 626, 629-32 (1962); *Hildebrand v. Honeywell, Inc.*, 622 F.2d 179, 181 (5th Cir. 1980); *Anthony v. Marion County General Hospital*, 617 F.2d 1164, 1167 (5th Cir. 1980). The Court will wait ten

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boards may be sued in federal court without raising an Eleventh Amendment issue. If an entity is found to be merely the instrumentality of state government it shares the immunity, but it has none if it is a politically independent unit.

J. Nowak, R. Rotunda, J. Young, Handbook on Constitutional Law at 51 (1978) (footnotes omitted); *see* L. Tribe, American Constitutional Law § 3-38, 144 n.2 (1978).

Moreover, a county is a *person* within the meaning of § 1983. Monell v. Department of Social Services, 436 U.S. 658 (1978); *cf.* Kingsville Independent School Dist. v. Cooper, 611 F.2d 1109, 1112 (5th Cir. 1980) (an independent school board is a local governing body within the meaning of *Monell*). However, unlike many governmental officials who enjoy qualified immunity against a § 1983 claim, *see, e.g.*, Pierson v. Ray, 386 U.S. 547, 555-57 (1967) (immunity of local police officers); O'Connor v. Donaldson, 422 U.S. 563 (1975) (qualified immunity for superintendent of state hospital), a municipal corporation like Washington County is not entitled to assert the good faith of its offices or agents as a defense to liability under § 1983. Owen v. City of Independence, 48 U.S.L.W. 4389 (U.S. Apr. 16, 1980) (No. 78-1779).

days for the plaintiff to take appropriate action against the defendant Washington County, Alabama. If the plaintiff fails to act the Court will dismiss the claims against Washington County with prejudice. Fed. R. Civ. P. 41(b).

The Clerk is further ordered to mail a copy of this order to Mr. Gerald Dennis Porter, Esq., who was the attorney for Washington County on November 14, 1979. If the county files a responsive pleading prior to the plaintiff moving for entry of default, the Court will treat the responsive pleading as a motion for summary judgment. After analyzing the liability of the county commission and the county hospital it appears from the record which has been developed in this case that no liability would attach to the county. The Court is giving notice to the plaintiff that if a responsive pleading is filed the Court will treat it as a motion for summary judgment ten days after it is filed. *See Friend v. Aetna Finance Co.*, 622 F.2d 1217 (5th Cir. 1980) (opposing party must be put on notice that Court is entertaining summary judgment); *Matter of Hailey*, 621 F.2d 169 (5th Cir. 1980) (Rule 56(c) must be strictly observed). Whether the proceedings against Washington County are disposed of through default, Fed. R. Civ. P. 55(a), (b)(1), through involuntary dismissal, Fed. R. Civ. P. 41(b), or through summary judgment, Fed. R. Civ. P. 56, an evidentiary hearing will be unnecessary unless, of course, the plaintiff raises some genuine dispute as to a material fact. *Cf. Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 893-95 (5th Cir. 1980).

E. Pendent State Claim

All of the federal claims presented in this action are being, or will be, disposed of summarily. The fully developed record, in which all relevant facts are established without any genuine dispute, permit summary disposition of federal claims. The damage question which must be

presented to the jury with regard to Sheriff Wheat under § 1983 will present very narrow issues of proof. The proof will be susceptible to quick presentation.

In addition to the federal claims, the complaint alleges a cause of action under Alabama's wrongful death statute.[16] The claim has been virtually ignored by the parties, including the plaintiff, in their motions for summary judgment. Only the hospital addresses it.

> In *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966) the Supreme Court counselled against a federal court's retention of pendent state-law claims when there has been a pre-trial disposition of the federal claims.
>
> > Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dis-

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[16] Alabama's wrongful death statute provides:

> (a) A personal representative may commence an action and recover such damages as the injury may assess in a court of competent jurisdiction within the state of Alabama, and not elsewhere, for the wrongful act, omission or negligence of any person, persons or corporation, his or their servants or agents, whereby the death of his testator in intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death.
>
> (b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained through there has not been prosecution, conviction, or acquittal of the defendant for the wrongful act, omission or negligence.
>
> (c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.
>
> (d) Such action must be commenced within two years from and after the death of the testator or intestate.

Ala. Code § 6-5-410 (1975).

> missed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

Id. at 726, 86 S. Ct. at 1139 (footnotes omitted). We have followed this teaching in declaring it within the discretion of our district courts to dismiss these pendent claims without prejudice when the federal claims are dismissed before trial. *Daniels v. All Steel Equipment, Inc.*, 590 F.2d 111 (5th Cir. 1979); *Scranton Construction Co. v. Litton Industries Leasing Corp.*, 494 F.2d 778 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105, 95 S. Ct. 774, 42 L. Ed. 2d 800 (1975).

Pharo v. Smith, 621 F.2d 656, 674-75 (5th Cir. 1980), *rev'd on rehearing on other grounds*, No. 77-1273, slip op. 9409-10 (5th Cir. Sept. 18, 1980).

Dismissal of the wrongful death action would promote comity and conserve this Court's resources. Moreover, the state statute of limitations[17] would not bar refiling in state court. *Cf. Pharo v. Smith*, No. 77-1273, slip op. at 9409-10 (5th Cir. Sept. 18, 1980) (on rehearing) (whether statute of limitations has run is a factor to consider). Therefore, it is ordered that the pendent state claim for wrongful death be dismissed without prejudice.

F. Motion for Amend the Complaint

Finally, the Court comes to the motion to amend the complaint which the plaintiff filed on September 2, 1980. The plaintiff seeks to amend his prayer for relief as follows:

> That this Court enjoin the defendants, their agents, assigns, successors, attorneys, and those acting in

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[17] Ala. Code § 6-5-410(d) requires a wrongful death action to be commenced within two years after the death of the intestate. *See* note 16 *supra* (text of § 6-5-410). In this case any state-court action would have to be commenced by November 8, 1980.

> concert with them from failing or refusing to adopt regulations which will insure that no patient from the Washington County Hospital suffering from alcoholism will be placed in the Washington County jail without adequate and continuing medical attention.

Amended complaint, filed on September 2, 1980. The Court denies the motion to amend the complaint because the plaintiff Bertha Morrison lacks standing to seek this type of remedy. This affirmative injunction would not inure to the benefit of the decedent. He is dead, regretably, and he will never have occasion to be placed in the Washington County jail in the future. As a practical matter any lawsuit such as this will prompt the responsible officials to reexamine their jail policies. However, courts deal with concrete problems and not ideological pursuits. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

G. Order

In sum, it is ordered that summary judgment be granted in favor of all defendants, except Washington County, on the claims under 42 U.S.C. §§ 1985(3), 1986. Except as to Sheriff Wheat and Washington County, summary judgment is granted as to all defendants on the § 1983 claim. As to Sheriff Wheat, summary judgment is granted in favor of the plaintiff, a non-moving party, on the issue of liability. The pendent state claim for wrongful death is dismissed without prejudice.

DONE this 7th day of October, 1980.

/s/ W. B. Hand
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7778

D.C. Docket No. CA 79-0632-H

BERTHA MORRISON,
Plaintiff-Appellant,

versus

WASHINGTON COUNTY, ALABAMA, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

Before GODBOLD, Chief Judge, FAY and SMITH *, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

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* Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

March 17, 1983

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7778

BERTHA MORRISON,
Plaintiff-Appellant,

versus

WASHINGTON COUNTY, ALABAMA, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion March 17, 11 Cir., 1983, —— F.2d ——)
(Apr. 25, 1983)

Before GODBOLD, Chief Judge, FAY and SMITH *, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on

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* Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
United States Circuit Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 79-0632-H

BERTHA MORRISON,

Plaintiff,

vs.

WASHINGTON COUNTY, ALABAMA, *et al.*,

Defendants.

[Filed Sep. 10, 1980]

AFFIDAVIT OF DAVID H. KNOTT, M.D., Ph.D.

STATE OF TENNESSEE)
COUNTY OF SHELBY)

David H. Knott, being duly sworn, deposes and says as follows:

1. My name is David H. Knott; I hold a Masters degree and a Ph.D. in Physiology, a Doctorate of Medicine degree, and am a Diplomat of the American Academy of Family Physicians. My academic appointments include: Clinical Assistant Professor of Family Medicine; Clinical Associate Professor of Psychiatry, and Associate Professor of Pharmaceutics at the University of Tennessee Center for the Health Sciences. Since 1965, I have served as the Medical Director of the Alcohol and Drug Clinic at Memphis Mental Health Institute. A copy of my Curriculum Vitae is attached hereto as Exhibit A.

2. Having had the opportunity to review the hospital record, the autopsy report, and other documents pertaining to the above referred litigation, I find that the diagnosis of Delirium Tremens, Diabetes Mellitus, and Hypertension are substantiated. In view of the fact that delirium tremens is a potentially fatal disorder, and that the morbidity and mortality of delirium tremens is augmented

and exacerbated by concomitant disorders, such as diabetes mellitus and hypertension, it is inconceivable to me that the decision was made to discharge the patient from a hospital setting to a totally medically unsupervised environment. This transfer in no way conforms to acceptable standards of care and treatment.

3. It is not incumbent upon family members to assume any treatment responsibility for a patient who is as psychotic and critically ill as was Mr. Morrison; rather, it is the responsibility of the hospital medical staff, nursing staff, and paraprofessional staff to provide for the basic medical-psychiatric needs and safety of the patient. While the decision to transfer Mr. Morrison was obviously that of the attending physician, I find it curious that no other health professional questioned the sagacity of such a move.

4. When delirium tremens is treated in a medically supervised setting, the mortality rate is extremely low. In settings which are not medically supervised, the mortality rate rises significantly. Judging from the autopsy report and from a statement made that, "feel cause of death was Acute Cardiac Arrest due to Acute Alcohol Myocardiopathy", I feel that the transfer of Mr. Morrison from a hospital setting to a jail contributed significantly to his death which might well have been prevented with adequate medical supervision.

/s/ David H. Knott
DAVID H. KNOTT, M.D., PH.D.

Sworn to and subscribed
before me this 9th day of
September, 1980.

/s/ [Illegible]
Notary Public

My Commission Expires Jan. 19, 1981